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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH V. JULIANO,
Petitioner,
vs.
COMMERCIAL LIFE INSURANCE COMPANY
and AUTOMATIC DATA PROCESSING, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does this Court's opinion in *Pilot Life Ins. Co. v. Dedeaux*, 107 S.Ct. 3085 (1987) require federal preemption of the California Insurance Code regulating unfair insurance company practices when ERISA saves from preemption laws which regulate insurance?

LIST OF PARTIES

The parties to the proceedings below were petitioner, JOSEPH V. JULIANO real party in interest, and respondents, COMMERCIAL LIFE INSURANCE COMPANY and AUTOMATIC DATA PROCESSING, INC., collectively referred to as COMMERCIAL LIFE.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

A. Purposes Underlying ERISA 4

B. JULIANO's Cause Of Action Against COMMERCIAL LIFE 6

C. Effect Of Preemption On Jurisdiction and Remedies In States Which Have Regulated Insurance Through the Promulgation Of Unfair Claims Practices Acts 9

Page

REASONS FOR GRANTING THE WRIT 12

I. THE CALIFORNIA SUPREME COURT FINDING OF PREEMPTION IS NOT COMPELLED BY THE *PILOT LIFE* DECISION AND IS DIRECTLY CONTRARY TO THE RIGHTS OF STATES TO REGULATE INSURANCE 12

II. CRITICAL DIFFERENCES BETWEEN A SELF-FUNDED PLAN AND A PLAN'S PURCHASE OF AN INSURANCE POLICY WERE NOT BRIEFED NOR CONSIDERED WHEN THIS COURT DECIDED *PILOT LIFE* 17

III. CONGRESSIONAL INTENT CREATING ERISA PREEMPTION IS CONSISTENT WITH SAVING FROM PREEMPTION A STATE REMEDY DESIGNED TO REGULATE AND ENFORCE INSURANCE LAWS. 21

CONCLUSION 25

Page

APPENDIX A

ALTERNATIVE WRIT OF MANDATE, SUPREME COURT OF THE STATE OF CALIFORNIA, FILED JAN 4, 1988 . . . . . .A-1

APPENDIX B

OPINION and DISSENTING OPINION, CALIFORNIA SUPREME COURT, FILED DEC 15, 1988 . . . . . .B-1

APPENDIX C

ORDER, COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, FILED NOV 3, 1987 . . . . .C-1

APPENDIX D

MINITE ORDER, SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO, DATED SEPT 21, 1987. . . . . .D-1

TABLE OF AUTHORITIES

Page

Cases

Addrisi v. Equitable Life Assur. Society of the U.S.
503 F.2d 725 (9th Cir. 1974), 420 U.S. 929,
95 S.Ct. 1129, *cert. den.* (1975),
421 U.S. 922, 95 S.Ct. 1590, *rehearing den.*
(1975), *disapproved on other grounds* 7

Colberg, Inc. v. State Dept. of Public Works
67 Cal.2d 408 (1967) 3

Dill v. Claims Administration Services, Inc.
178 Cal.App.3d 1184, 24 Cal.Rptr. 273 (1986) . . .7

Federal Trade Commission v. National Cas. Co.
357 U.S. 560, 78 S.Ct. 1260 (1958) 7

Firestone Tire and Rubber Co. v. Bruch
No. 87-1054, __ U.S. __ (1989) 19, 20

Fort Halifax Packing Co., Inc. v. Coyne
107 S.Ct. 2211 (1987) 19

Greenberg v. The Equitable Life Assurance
Society of the United States
34 Cal.App.3d 994 (1973) 7

Holmes v. Pacific Mutual Life Ins. Co.
__ F. Supp. __ (C.D. 1989)
No. CV-FA-88-388-JSL 12

Jordan v. Reliable Life Insurance Company
694 F.Supp. 822 (1988) 11

Page

Kanne v. Connecticut Gen. Life Ins. Co.
859 F.2d 96 (9th Cir. 1988) 9

Massachusetts Mutual Life Ins. Co. v. Russell
473 U.S. 134 (1985) 16-18

Metropolitan Life Ins. Co. v. Massachusetts
471 U.S. 744 (1985) 8, 12, 17, 22, 23

Moore v. American United Life Insurance Company
150 Cal.App.3d 610 (1984) 7

Pilot Life Ins. Co. v. Dedeaux 5, 9-12,
481 U.S. 41 (1987) 16-18, 22, 23, 25

Richardson v. GAB Business Services, Inc.
161 Cal.App.3d 519, 207 Cal.Rptr. 519 (1984) . . .7

Rizzi v. Blue Cross,
206 Cal.App.3d 380 (1988) 13, 19

Royal Globe Insurance Company v. Superior Court
23 Cal.3d 880 (1979) 7

SEC v. National Securities, Inc.
393 U.S. 453 (1969) 15

Shernoff v. Superior Court
44 Cal.App.3d 406 (1975) 7

St. Paul Fire & Marine Ins. Co. v. Barry
438 U.S. 531, 98 S.Ct. 2923 (1978) 7

Wolfrich Corporation v. United Services
Auto Association
149 Cal.App.3d 1026, 97 Cal.Rptr. 446 (1983) . . .7

Page

Federal Statutes

McCarran-Ferguson Act (1976)
15 U.S.C. §§1012, et seq. 3, 14, 15

Employee Retirement Income Security Act of 1974
29 U.S.C. §502(a) 5
29 U.S.C. §502(a)(1)(B) 5
29 U.S.C. §1001, et seq. 2
29 U.S.C. §1001(a) 13, 14
29 U.S.C. §1001(b) 14
29 U.S.C. §1001(c) 14
29 U.S.C. §§1001-1461 (1982) §2(b) 5
29 U.S.C. §1144 4
29 U.S.C. §1144(b)(2)(A). 6, 22
29 U.S.C. §1144(d) 6

State Statutes

California Insurance Code
§790.01 7
§790.02 7
§790.03 6-9
§790.03(h). 2, 3

Legislative Material

H.R. Rep. No. 807, 93d Cong., 2d. Sess., reprinted
in 1974 *U.S. Code Cong. & Admin. News* 4

S. Rep. No. 383, 93d Cong., 2d Sess., reprinted
in 1974 *U.S. Code Cong. & Admin. News* 4, 5

Page

Publications

Egelko, *Losing Faith in Bad Faith*,
California Lawyer, October 1987 10

Ripple-effect Ruling, A.B.A. Journal,
December 1, 1988 9

"Financial Statement Accounting for Punitive
or Monetary Damages and Claim and
Award Contingencies, and Reports to the
Insurance Commissioner of Material
Awards, Settlements, Fines, and Penalties,"
State of California, Department of Insurance
Accounting Statement 84-1 issued
November 26, 1984 18

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOSEPH V. JULIANO,

Petitioner,

vs.

COMMERCIAL LIFE INSURANCE COMPANY and AUTOMATIC DATA PROCESSING, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner, JOSEPH JULIANO, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Supreme Court entered in the above-entitled proceeding on December 15, 1988.

OPINIONS BELOW

The opinion of the California Supreme Court in *Commercial Life Ins. Co., et al. v. Superior Court of San Diego County* (Joseph V. Juliano, Real Party in Interest) has not yet been reported in the official reports. The decision as will be published is reprinted as Appendix "B," attached hereto. The Alternative Writ of Mandate is attached as Appendix "A."

The opinion of the District Court of Appeal denying the Petition for Writ of Mandate filed by respondents is not printed in the official reports and is attached as Appendix "C."

The Superior Court's Minute Order is attached as Appendix "D."

JURISDICTION

Petitioner originally brought this action in the Superior Court of California, County of San Diego, on May 24, 1985. Respondents answered and filed a Motion for Judgment on the Pleadings. The trial court denied respondents' motion as to one cause of action. Respondents' Petition for Writ of Mandate to compel the trial court to enter judgment on the pleadings was denied on November 3, 1987. The California Supreme Court granted respondents' Petition for Review and issued its opinion on December 15, 1988. The decision issued a peremptory Writ of Mandate directing the Superior Court of San Diego County to vacate its order denying defendants' Motion for Judgment on the Pleadings as to plaintiff's cause of action for breach of statutory duties under California Insurance Code §790.03(h) and to enter a new order finding preemption under 29 U.S.C. §1001, *et seq.*

The jurisdiction of this court to review the judgment of the California Supreme Court is based upon the federal question presented by the California Supreme Court's interpretation of the Employee Retirement Income Security Act of 1974 (29 U.S.C. §1001, *et seq.*)

STATUTES INVOLVED

The principal statutes involved are: The Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. §1001, *et seq.* Pertinent portions of this statute are quoted in the California Supreme Court opinion attached as Appendix "B." The California Insurance Code §790.03(h) (Wests 1982) quoted in fn. 2 of page B-2 of

Appendix "B." The McCarran-Ferguson Act, 15 U.S.C. §§1012, *et seq.*, partially quoted *infra* at pp. B-14, B-15

STATEMENT OF THE CASE

Petitioner JOSEPH JULIANO suffered from diabetes and, eventually, from diabetic retinopathy.[1] JULIANO and JULIANO's doctor obtained authorization to perform surgery from COMMERCIAL LIFE and COMMERCIAL LIFE confirmed that JULIANO's claims were covered under an insurance policy issued by COMMERCIAL LIFE. COMMERCIAL LIFE paid some medical bills and then arbitrarily refused to pay additional medical bills asserting that the diabetic retinopathy was a preexisting condition and therefore excluded from coverage.

COMMERCIAL LIFE's refusal to pay JULIANO's claim for medical treatment was in violation of standards set forth in California Insurance Code §790.03(h).

JULIANO's employer was the policyholder of a group insurance policy issued by COMMERCIAL LIFE INSURANCE COMPANY and administrated by AUTOMATIC DATA PROCESSING, INC.

JULIANO sued COMMERCIAL LIFE in state court. The Complaint alleged eight common law causes of action for insurance bad faith and a single statutory cause of action for violation of California Insurance Code §790.03(h).

Upon Motion for Judgment on the Pleadings, all of JULIANO's common law causes of action were ruled to

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[1] Because this case arose following judgment on the pleadings, the facts as alleged in the Complaint are deemed true. *Colberg, Inc. v. State Dept. of Public Works*, 67 Cal.2d 408, 412 (1967). Some of the pertinent facts alleged are not set forth in the Supreme Court opinion.

be preempted by the Employee Retirement Income Security Act (ERISA). The trial court found JULIANO's claim for violation of the California Insurance Code was not preempted. COMMERCIAL LIFE filed a Petition for Writ of Mandate in the court of appeal. The court of appeal summarily denied the Petition. The California Supreme Court granted review and issued an alternative writ. Upon submission, the California Supreme Court issued a Peremptory Writ of Mandate to the Superior Court of San Diego County ordering it to vacate its order denying COMMERCIAL LIFE's Motion for Judgment on the Pleadings and to enter an order consistent with a finding that JULIANO's cause of action for breach of statutory duties set forth in the California Insurance Code was preempted by ERISA.

A. Purposes Underlying ERISA

ERISA was never intended to regulate insurance. ERISA was never intended to affect the rights of states to regulate insurance. Congress enacted ERISA to address particular social problems. Of specific concern, was the possibility of widespread abuse by the fiduciaries of employee pension plans. Underfunded pension plans, irresponsible fiduciaries, and a generally depressed economic environment contributed to the likelihood that many employees might be unable to obtain pension benefits even as the entire work force aged and the Social Security system became more and more precarious.[2]

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[2] *See generally*, 29 U.S.C. §1144; H.R. Rep. No. 807, 93d Cong., 2d. Sess., reprinted in 1974 *U.S. Code Cong. & Admin. News* 4670, 4678-9, 4680 ("House Report No. 807"); S. Rep. No. 383, 93d Cong., 2d Sess., reprinted in 1974 *U.S. Code Cong. & Admin. News* 4890, 4892 ("Senate Report No. 383").

ERISA's purpose was to establish standards of conduct, to set forth the obligations of employee benefit plan fiduciaries and to provide "appropriate remedies, sanctions, and ready access to the federal courts" for the failure of a plan fiduciary to live up to its responsibilities under ERISA. Public Law 93-406, as codified at 29 U.S.C. §§1001-1461 (1982) §2(b). Congress intended "to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of *fiduciary responsibilities* under state law or recovery of benefits due to participants." S.Rep. 383, 93d Cong., 2d. Sess. reprinted in 1974 *U.S. Code Cong. & Admin. News 4871.* As this Honorable Court recognized in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), the civil enforcement provisions of ERISA §502(a) "are one of the essential tools for accomplishing the stated purposes of ERISA."

The ERISA civil enforcement scheme as set out in Section 502(a)(1)(B) was established to avoid conflicting and inconsistent state and local regulation of employee benefit plans. ERISA includes a broad preemption provision placing regulation of employee benefit plans with the federal government and in the federal courts. Senator Harrison Williams introduced the ERISA conference report stating "It should be stressed, that with the narrow exceptions specified in the bill, the substantive and enforcement provisions are intended to preempt the field for Federal regulations." Statement of Senator Harrison A. Williams, Jr. reprinted in 1974 *U.S. Code Cong. & Admin. News* 5177. Thus, federal law regulates *plans*, in furtherance of Congress' goals to make plans available, to protect plan participants by securing benefits and to avoid the possibility of conflicting state laws affecting plans. Federal law does not regulate those narrow exceptions specified in the bill. *One of those exceptions is insurance.*

Traditionally, states have had the right to regulate the insurance industry. Consistent with the McCarran-Ferguson Act and with ERISA's savings clause,[3] Congress has specifically left regulation of insurance to the states. As part of the states' responsibility to regulate insurance, many states have enacted Unfair Claims Practices statutes. California Insurance Code §790.03 is just such a statute but the California Supreme Court has determined that ERISA preemption prevents California Courts and the California Legislature from enforcing that statute.

B. JULIANO's Cause Of Action Against COMMERCIAL LIFE

For the purpose of a judgment on the pleadings, the allegations in the Complaint are deemed true. Therefore, COMMERCIAL LIFE violated the California Insurance Code and committed unfair insurance practices when it denied JULIANO's claim. Under California law, an insurance company's obligations to obey the Insurance Code are different, and beyond, the terms of the insurance policy. Damages for violation of the Code are not

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[3] Pertinent portions of the McCarran-Ferguson Act are set forth on pp. B-14, B-15, *infra*.

ERISA twice saves state law regulating insurance from preemption. First, ERISA provides that "nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . ." (29 U.S.C. §1144 subd. (d).) This portion of ERISA mandates that the McCarran Act, passed by Congress to reaffirm state power to regulate insurance, not be affected by ERISA.

Second, the "savings" clause of ERISA commands that ". . . nothing in this subchapter [ERISA's preemption provisions] shall be construed to exempt or relieve any person from any law of any state which regulates insurance . . . ." (29 U.S.C. §1144 subd. (b)(2)(A).)

the same as a claim for benefits under the plan. *Moore v. American United Life Insurance Company*, 150 Cal. App.3d 610 (1984). A cause of action for violation of the Insurance Code does not lie against anyone who is not in the business of insurance, and does not apply outside the insurance industry.[4]

California court decisions creating the cause of action for violation of the Code specifically stated that the purpose of Insurance Code §790.03, *et seq.* is to regulate trade practices in the business of insurance.[5] California Insurance Code §790.03 regulates only the insurer, it

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[4] *See, e.g., Dill v. Claims Administration Services, Inc.*, 178 Cal.App.3d 1184, 24 Cal.Rptr. 273 (1986) (self-insured employers' independently retained claims administrator is not in the business of insurance and not subject to section 790.03); *Richardson v. GAB Business Services, Inc.*, 161 Cal.App.3d 519, 207 Cal.Rptr. 519 (1984) (Section 790.03 is not applicable to self-insured corporations or independent adjusting firms); *Wolfrich Corporation v. United Services Auto Association*, 149 Cal.App.3d 1026, 1207-1210, 97 Cal.Rptr. 446, 448 (1983) (attorneys engaged by an insurance company are not engaged in the business of insurance and not liable under section 790.03); *Federal Trade Commission v. National Cas. Co.*, 357 U.S. 560, 78 S.Ct. 1260 (1958) (state laws proscribing unfair insurance advertising constitute state regulation of the business of insurance as that phrase is used in the McCarran-Ferguson Act); *Addrisi v. Equitable Life Assur. Society of the U.S.*, 503 F.2d 725, 728 (9th Cir. 1974), 420 U.S. 929, 95 S.Ct. 1129, *cert. den.* (1975), 421 U.S. 922, 95 S.Ct. 1590, *rehearing den.* (1975), *disapproved on other grounds, St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 98 S.Ct. 2923 (1978) (holding that Article 6.5 of the Insurance Code is a state law regulating the business of insurance). California Insurance Code §§790.01 and 790.02 recite that Article 6.5 applies to persons and practices "in the business of insurance."

[5] *See, Royal Globe Insurance Company v. Superior Court*, 23 Cal.3d 880, 884-885 (1979); *Shernoff v. Superior Court*, 44 Cal. App.3d 406 (1975); *Greenberg v. The Equitable Life Assurance Society of the U.S.*, 34 Cal.App.3d 994 (1973).

therefore does not come under the preemption clause at all. In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 744 (1985), this Honorable Court held that a Massachusetts' statute requiring certain provisions in a health policy was not preempted by ERISA: "Laws that regulate only the insurer, or the way in which it may sell insurance, do not 'relate to' benefit plans in the first instance." California Insurance Code §790.03 is a direct regulation only of the insurer, it does not relate to a benefit plan.

Whether California Insurance Code §790.03 is a law regulating insurance is not seriously disputed. The California Supreme Court in this case *assumed* the Unfair Claims Practices Act was a law regulating insurance.[6]

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[6] *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985), applied three criteria adopted by case law to define the "business of insurance" under the McCarran-Ferguson Act: " 'first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.' " Of the three judicially-created criteria concerning the "business of insurance" as established under the McCarran-Ferguson Act, the only factor which is not obviously apparent in California Insurance Code §790.03 is whether the section has the effect of transferring or spreading a policyholder's risk. Yet, even under that factor, §790.03 succumbs. For example, the statute requires a prompt, reasonable explanation of the basis relied upon in the insurance policy in relation to the facts or applicable law to justify denial of a claim. Under California law, an ambiguity in an insurance policy is to be resolved against the insurance policy. In assessing a risk actuarially, the likelihood of payment on the claim is affected by whether the resolution of an ambiguous term in the policy can be relied on to exclude coverage. Resolution in favor of payment for an ambiguous clause in the policy has the effect of transferring or spreading a policyholder's risk which, in another state, may not present a risk at all.

The Ninth Circuit in *Kanne v. Connecticut Gen. Life Ins. Co.*, 859 F.2d 96 (9th Cir. 1988), has also assumed, for the purpose of ERISA preemption, that California Insurance Code §790.03 regulates insurance. Thus, JULIANO's claim for damages for COMMERCIAL LIFE's violation of California's Insurance Code did not rise out of obligations in the policy and did not relate to his claim for benefits under the plan.

C. Effect Of Preemption On Jurisdiction And Remedies In States Which Have Regulated Insurance Through The Promulgation Of Unfair Claims Practices Acts

Referring to the Ninth Circuit decision in *Kanne*, *supra*, 859 F.2d 96, holding that a claim based on California Insurance Code §790.03 was preempted by ERISA, counsel for Connecticut General stated: "It would be difficult to overstate the importance of this decision, . . . over the next few years it could mean hundreds of millions of dollars." *Ripple-effect Ruling*, A.B.A. Journal, December 1, 1988, p. CE2. These hundreds of millions of dollars are going into the pockets of the insurance companies, not pension plans. As will be shown in section II, page 17 below, the critical difference between an underwritten insurance policy which an employee benefit plan purchases and a self-funded employee benefit plan illustrates that the effect of preemption on the public policy encouraging provision of plans is nil as it pertains to a private remedy for violation of a state Insurance Code.

As noted in the *Pilot Life* decision, one of ERISA's principal purposes was to provide speedy, equitable relief for participants in employee benefit plans who are unable to obtain their benefits. The practical effect of

ERISA, as the exclusive remedy in those states giving a private cause of action for violation of the state's Insurance Code, is to actually cut back on the ability of plan participants to get to court. Lawyers are unwilling or unable to protect workers in federal court for small medical claims against insurance companies who are capable of spending large amounts of money to hire lawyers to appear for them. *See generally*, Egelko, *Losing Faith in Bad Faith*, California Lawyer, October 1987, p. 27.

Since this court's opinion in *Pilot Life*, preemption has run amok. One frustrated district court recently said:

> The ERISA quicksand is fast swallowing up everything that steps in it or near it. This morass serves as the state for a theater of the absurd . . .
>
> If the congressional intention were to immunize insurance companies from liability whenever they can show some arguable reason for their refusal to pay a claim, Federal District Courts should have already ordered the appropriate rubber stamps. If this court is looking in the mouth of the gift horse that would allow the court to abdicate its routine responsibility, it is because there are countervailing forces called 'justice' and the seventh amendment's guarantee of a jury trial, both of which here give this court pause. . . .
>
> There is a growing phalanx of courts expressing the fear that ERISA will continue to expand and to preempt everything in its meandering path. Only Congress or the Supreme Court can rescue us from the quicksand. Meanwhile, this Court has paused, reflected, and concluded that Mrs. Jordan's case is not one in which she can be required to forego her traditional trial by

> jury.
> *Jordan v. Reliable Life Insurance Company*, 694 F.Supp. 822 (1988).

Justice Mosk dissenting in *Juliano* declared:

> There is a growing and ominous trend toward federal preemption of issues that belong within the sphere of control of the individual states. And these inroads into traditional federalism are taking place despite their inconsistency with pious rhetoric emanating from Washington about returning government to the people at state and local levels. Appendix "B" p. B-24.

Courts are reading *Pilot Life* so broadly that if an insurance company even asserts ERISA preemption, the door to court slams shut. Recently, the husband and children of a woman who died as a result of an insurance company's negligent verification of coverage brought a wrongful death negligence action in state court. After removal to federal court, the insurance company brought a Motion for Summary Judgment based on the fact that the wife and mother was insured under an employee benefit plan. The district court found preemption, granted summary judgment and cavalierly concluded:

> the only remaining question — whether ERISA itself might provide a remedy to plaintiffs — seems settled in favor of defendants by the holding in *Russell* [Citation]. To allow such claims or claims like the one at issue here, to go forward under ERISA would defeat the very purpose for which preemption is provided.

The action was not brought by a plan beneficiary for benefits under the plan. No plan benefits were sought, no breach of fiduciary duty was alleged. No negligent administration of a fiduciary's responsibility to an

employee welfare benefit plan was claimed. There was no involvement whatsoever by the employee, or the employer, as the plan.[7]

Courts have taken this court's opinion in *Pilot Life* far beyond the congressional intent in ERISA and even this court's opinion. The broad brush picture painted by Justice O'Connor's sweeping language in the second half of the *Pilot Life* opinion does not mention the effect of the opinion on those states which have regulated insurance by way of Unfair Claims Practices statutes. This silence portends ominous results for hundreds of thousands of state residents, like JULIANO, who have claims pending against insurance companies to enforce their rights under state laws regulating insurance. Petitioner respectfully requests this court give some guidance on this question and give more than lip service to the savings clause.

REASONS FOR GRANTING THE WRIT

I.

THE CALIFORNIA SUPREME COURT FINDING OF PREEMPTION IS NOT COMPELLED BY THE *PILOT LIFE* DECISION AND IS DIRECTLY CONTRARY TO THE RIGHTS OF STATES TO REGULATE INSURANCE.

In *Metropolitan Life Ins. Co. v. Massachusetts*, this Honorable Supreme Court said:

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[7] *Holmes v. Pacific Mutual Life Ins. Co.*, filed January 18, 1989, United States District Court, Central District of California, No. CV-FA-88-388-JSL, published at 89 Daily Journal D.A.R. 2984.

> We . . . must presume that Congress did not intend to pre-empt areas of traditional state regulation. 105 S.Ct. at p. 2389, 471 U.S. at p. 740
>
> The presumption is against pre-emption, . . . 105 S.Ct. at p. 2390, 471 U.S. at p. 741

It is clear that ERISA was established for the primary purpose of safeguarding employee pensions plans, and was addressed to the problem that many pension plans relied on by employees for retirement income were rendered insecure and illusory by various questionable practices by the people administering the plans. Indeed, ERISA's title itself refers only to "retirement income security." The type of health care benefits involved at bar were and are incidental and secondary to the plan. Thousands of employers who have not set up plans simply provide medical insurance as part of employee compensation. Nevertheless, California state courts find ERISA preemption even where there is no actual employee benefit plan.[8]

Congress' findings and declaration of policy are found in 29 U.S.C. §1001, subdivision (a):

> 1. "that despite the enormous growth in [employee benefit] plans many employees with long years of employment *are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans*";
>
> 2. "that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered";
>
> 3. "that owing to the termination of plans before requisite funds have been accumulated,

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[8] *See, e.g., Rizzi v. Blue Cross*, 206 Cal.App.3d 380 (1988).

employees and their beneficiaries have been deprived of anticipated benefits"; and

4. "it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenues of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such [employee benefit] plans and their financial soundness." (Emphasis added.)

Subdivision (b) of 29 U.S.C. §1001 refers exclusively to reporting and disclosure requirements, which are obviously aimed at insuring the objective of adequate funding of ERISA employee benefit plans, and are peculiarly applicable to funding of retirement benefits. Their applicability to medical and hospitalization plans is marginal. They have no affect on insurance.

Subdivision (c) of 29 U.S.C. §1001 refers only to private pension plans.

Thus, nothing in the Congressional findings and declarations of policy even remotely reflect a Congressional intention to preempt state laws aimed at protecting beneficiaries of medical, hospital or disability insurance contracts. To the contrary, these sections plainly and explicitly state that the "well-being and security of millions of employees and their dependents" is the primary purpose of ERISA. 29 U.S.C. §1001, subdivision (a).

Long before the potential problems affecting employee retirement plans came to the attention of Congress, Congress established the national policy of state primacy in the regulation of insurance by enacting the McCarran-Ferguson Act, 15 U.S.C. §§1012, *et seq*. The McCarran-Ferguson Act provides, in pertinent part:

> Regulation by State law: Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948. (a) The business of insurance, and every person engaged herein, shall be subject to the laws of the several States which relate to the regulation of taxation of such business.
>
> (b) No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by the State for the purpose of regulating the business of insurance . . .

15 U.S.C. §1012 (1976).

In *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969), this Court observed:

> The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation.
>
> . . . Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the 'business of insurance' does the statute apply . . . Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which *Paul v. Virginia* [8 Wall. 168, 19 L.Ed. 357] held was not 'commerce.' The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement — these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term,

> it is clear where the focus was — it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance.'

When Congress drafted ERISA they were "primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

No one, not Congress, not insurance companies, not employers, no one, ever dreamed that ERISA would preempt a state's ability to regulate insurance by creating a private right of action for violation of that state's Insurance Code. As a matter of fact, at the time ERISA was drafted, insurance companies had long complied with different and inconsistent state regulation of insurance. The insurer is not the plan. ERISA regulates employer benefit plans. States regulate insurance. An employer may purchase insurance as one of several services or benefits provided by the plan. However, the insurance policy purchased is no more than any other service or product necessary for the plan's operation. For example, if the plan fiduciary required office space in a building, that building would have to comply with local building codes. If a plan participant was injured as a result of faulty construction in violation of the building code, his cause of action against the builder would not be preempted by ERISA. This analysis holds true regardless of whether he entered the building in order to obtain benefits under the plan.

This court's decision in *Pilot Life* did not address a claim based on a state statute regulating insurance. In fact, when faced with a state statute which obviously did

regulate insurance, this court held there was no preemption. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985). Petitioner respectfully requests this court grant this Petition for Writ of Certiorari and secure the right of state legislatures to regulate insurance by enforcement of Unfair Claims Practices Acts.

II.

CRITICAL DIFFERENCES BETWEEN A SELF-FUNDED PLAN AND A PLAN'S PURCHASE OF AN INSURANCE POLICY WERE NOT BRIEFED NOR CONSIDERED WHEN THIS COURT DECIDED *PILOT LIFE*.

This Honorable Court did not have the benefit of briefing on the critical distinction between self-funded employee benefit plans which provide medical benefits and a plan's purchase of an insurance policy to provide medical benefits. It is this distinction that points out the important questions and, the error, presented in the California Supreme Court's decision in *Juliano*.

Permitting a plan participant to obtain additional relief for oppressive and fraudulent conduct by an insurance company is consistent with ERISA and "would best effectuate the underlying purpose of ERISA — enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans and the promotion of the best interests of participants and beneficiaries." See Justice Brennan's concurring opinion in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) at p. 158. Justice Brennan was referring to trust law principals, which are not expressly exempted in the ERISA savings clause as are banking, securities and insurance laws. These express exemptions present all

the more reason to permit states to regulate insurance by regulating claims practices.

Whether or not extracontractual damages are available against a plan fiduciary for failure to provide benefits under the plan, the obligations of an insurance company as set forth by state insurance law remain unchanged and state law providing damages for violation of the insurance regulation has no effect on the plan or on the relationship between the plan fiduciary and the plan beneficiary. The greatest area of sensitivity concerning a state's creation of remedies, in addition to those provided by ERISA has been the issue of punitive damages. *See Russell, supra.* Yet, California does not permit an insurance company to pass on costs for punitive damage awards to policyholders by increased premiums and, therefore, the plan is unaffected by extracontractual remedy against the insurer.[9]

Insurance companies are obligated to obey the state's Insurance Code whether or not the policy has been purchased incident to an employee benefit plan or by an individual. The only effective difference of ERISA preemption in states with separate remedies for violation of the Insurance Code is that the employee is entitled to *less* protection than the individual. This holds true although there is no appreciable benefit to the plan by way of reduced premium for reduced risk. If preemption is necessary to secure low cost medical benefits for participants in employee benefit plans, costs for exempt groups would be higher than for employee benefit plans covered by ERISA. The fact is, since this court's decision in *Pilot Life*, not one insurance company in

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[9] "Financial Statement Accounting for Punitive or Monetary Damages and Claim and Award Contingencies, and Reports to the Insurance Commissioner of Material Awards, Settlements, Fines, and Penalties," State of California, Department of Insurance Accounting Statement 84-1 issued November 26, 1984.

California has lowered group rates as a result of the decrease in potential risk for group insurance claims in California.

Two of this court's recent decisions have, by inference, recognized a difference between rules which should apply to self-funded plans and those which should apply to underwritten insurance policies. *Fort Halifax Packing Co., Inc. v. Coyne*, 107 S.Ct. 2211 (1987) concludes that a statute providing a one-time severance payment to employees in the event of plant closing was not preempted by ERISA. *Fort Halifax* declared ERISA was not implicated because ERISA was enacted to require disclosure and provide safeguards in the establishment, operation and administration of employee benefit plans and to prevent particular abuses of the fiduciaries managing the plan, such as self-dealing, imprudent investing, and misappropriation of plan funds. *Id.* at pp. 2219-2220. Analyzing *Fort Halifax* in determining whether a group insurance plan was preempted by ERISA, a California Court of Appeal has reasoned:

> Applying by analogy the Fort Halifax analysis here, the line of demarcation between ERISA plans and non-ERISA plans depends on the level of involvement by the employer in the program so as to warrant federal regulation of the administrative integrity of the program. That is, when employers provide benefits to employees in a manner which involves the employer's administration of funds to be used for the employees, ERISA's concern with regulating the administrative integrity of the program arises.
>
> *Rizzi v. Blue Cross*, 206 Cal.App.3d 380 (1988)

This court's February 21, 1989 decision in *Firestone Tire and Rubber Co. v. Bruch*, No. 87-1054, sets forth

reasons for removing the arbitrary and capricious standard for denial of ERISA claims when the denial is by a nonfiduciary. Following *Firestone*, claims for benefits must be reviewed under a de novo standard unless the plan administrator or fiduciary has been given *express* discretionary authority to determine benefits. Yet the mere fact that an administrator has been given discretionary authority to deny claims for benefits cannot be interpreted, under *Firestone*, to give complete discretion to the administrator.

Applying the *Firestone* analysis in the insurance context points out the critical difference between self-funded and underwritten medical coverage. Under *Firestone*, a self-funded plan where the fiduciary has been given complete express authority to determine eligibility and benefits the employer is entitled to preemption and the employee is limited to ERISA remedies. This furthers Congressional goals protecting the integrity of the plan and securing benefits for the employee. However, with the underwritten policy, an insurance company would be required to obey state law in its conduct concerning claim review and payment, subject to the court's de novo review of its decision. This poses no greater burden on the insurance company than is already required by state law and has no effect on the employee benefit plan.

This court should grant this Petition for Writ of Certiorari in order to consider briefing on the critical differences between ERISA preemption as it affects self-funded plans and as it affects employee benefit plans which contract with insurance companies by purchasing insurance.

III.

CONGRESSIONAL INTENT CREATING ERISA PREEMPTION IS CONSISTENT WITH SAVING FROM PREEMPTION A STATE REMEDY DESIGNED TO REGULATE AND ENFORCE INSURANCE LAWS.

In his dissenting opinion in this case, Justice Mosk argues that the state's creation of a remedy in addition to those provided by ERISA, does not affect the enforcement scheme of the federal statute.

> [T]he majority hold that §790.03(h) is not saved from preemption and hence that Juliano's claim under the statutory provision is barred. In support they assert that ERISA has established a civil enforcement scheme that provides exclusive remedies. That may be true. But ERISA's scheme defines remedies *for the violation of rights granted employees under the terms of plans within the coverage of the act and under the act itself.* (See ERISA §502(a), 29 U.S.C. §1132(a).) [Footnote omitted.] By contrast, the Unfair Trade Practices Act, of which §790.03(h) is a part, has established a civil enforcement scheme that provides remedies *for the breach of duties imposed on insurers under the laws of the State of California.* In a word, the remedy of ERISA may be exclusive in their own sphere, but they do not extend into the sphere occupied by §790.03(h). [Citation]
>
> Thus, ERISA does not preempt §790.03(h), but expressly saves the provision as a law "regulating insurance." Further, the civil enforcement scheme of the federal statute does not

> displace the civil enforcement scheme of the state act: the former concerns the rights of employees under covered plans, the latter the duties of insurers under state law. See Appendix "B" pp. B-23, B-24.

Even though no United States Supreme Court decision has set forth an interpretation of ERISA preemption that would require wholesale nullification of a state law regulating insurance, state and federal courts across the country have read such a result between the lines in *Pilot Life*. The California Supreme Court, in this case, stated:

> Our reading of *Pilot Life* accords with that of the Ninth Circuit in *Kanne*. [*Kanne v. Connecticut General Life Ins. Co.* 859 F.2d 96] We are persuaded that §790.03, subdivision (h) would still be preempted by ERISA even if it were found to be within the scope of the savings clause as a law regulating insurance. This conclusion is compelled by the Supreme Court's discussion of Congressional intent, which the court cited as the most significant factor in its determination. See Appendix "B" p. B-14.

As discussed above, the decision of this Honorable Court in *Metropolitan Life Ins. Co. v. Massachusetts*, *supra*, clearly shows that ERISA preemption does not apply to state laws enacted to protect beneficiaries of health care insurance. That case states the presumption against preemption of areas of "traditional state regulation" (471 U.S. at p. 740). The opinion further states that "we are not inclined to read limitations into federal statutes in order to enlarge their preemptive scope" (471 U.S. at p. 741) and this Honorable Court rejected the contention that "Congress intended [a] narrow reading of the savings clause," 29 U.S.C. §1144(b)(2)(A). 471 U.S. at pp. 745-746.

Thus, the logical extension of *Metropolitan Life Insurance Co.* would find no preemption of a specific state statute which, on its face, states that its purpose is to regulate insurance and, under either the common sense test or the three factors announced by courts interpreting the McCarran-Ferguson Act, regulates insurance.

Pilot Life does not require and this court should not permit preemption of state laws regulating insurance. The second half of the *Pilot Life* decision 107 S.Ct. at pp. 1555-1558 discussing exclusivity of ERISA remedies, should only apply to actions in which the savings clause does not apply. Otherwise, nothing is saved by the savings clause and this Honorable Court's detailed discussion and analysis of whether the Mississippi common law is a state law regulating insurance is superfluous. The California Supreme Court in this case stated: "We conclude that *Pilot Life's* express holding controls the resolution of this case. [Footnote omitted.] *Pilot Life* is directly on point regarding the exclusivity issue and its conclusion is inescapable." Appendix "B," p. B-15. The JULIANO court placed great emphasis on the important policy of promoting uniformity in employee benefit plan remedy by eliminating the potential for conflicting standards of recovery. This reliance is misplaced. As discussed above, the remedies for violation of the Insurance Code do not affect uniformity of remedies available under employee benefit plans and do not create the potential for conflicts amongst the various states of laws affecting the plans.

Concern for the aftereffects of *Pilot Life* foreclosing remedies other than those provided in ERISA for the denial of insurance claim benefits reached Congress late last year. In conjunction with H.R. 4845, the "Miscellaneous ERISA Amendments Act of 1988," the committee report rejected some courts' narrow view that ERISA contains exclusive remedies and makes the following statement:

> The Committee believes that the legislative history of ERISA and subsequent expansions of ERISA support the view that Congress intended for the courts to develop a federal common law with respect to employee benefit plans, including the development of appropriate remedies, even if they are not specifically enumerated in §502 of ERISA. Since the issue of preemption and civil remedies under ERISA is within the exclusive purview of the labor committees of Congress, the Committee has, over the years, considered the option of amending the statute to encompass specifically several additional remedies. In light of the legislative history on this issue, however, the Committee believes such action is unnecessary. The Committee reaffirms the authority of the federal court to shape legal and equitable remedies to fit the facts and circumstances of the cases before them, even though those remedies may not be specifically mentioned in ERISA itself. In cases in which, for instance, facts and circumstances show that the processing of legitimate benefit claims has been unreasonably delayed or totally disregarding by an insurer, an employer, a plan administrator, or a plan, the Committee intends the federal courts to develop federal common law of remedies, including (but certainly not limited to) the imposition of punitive damages on the person responsible for the failure to pay claims in a timely manner.

The committee report emphasizes the need for effective remedies against the insurer, the employer, and the plan. Consistent with the legislative intent underlying creation of ERISA and this most recent pronouncement of legislative intent, this court should settle the question

of whether the states remain free to regulate insurance and clarify that this court's decision in *Pilot Life* does not preclude the State of California from enacting or enforcing laws regulating insurance even if those laws contain civil enforcement provisions against insurance companies which are not provided in ERISA.

CONCLUSION

Congress could never have intended the results which have flowed from this court's decision in *Pilot Life* as the various state and federal courts are faced with the question of insurance regulation under Unfair Claims Practices Acts. ERISA was designed to secure workers' ability to collect pensions. At the time ERISA was written, correction of unfair insurance claims practices was not even a problem considered or addressed by Congress. Many states had statutes and case law regulating insurance claims practices. McCarran-Ferguson was well in place. Courts and industry alike assumed ERISA had no effect on these laws. Not one of the insurance industry briefs filed in any court seriously denies the catastrophic effect of ERISA preemption of claims for medical benefits in those states with carefully reasoned and specific unfair claims practice legislation. This Petition for Certiorari should be granted. The wholesale emasculation of the states' rights to regulate insurance should be corrected by this Honorable Court.

Dated: March 15, 1989

Respectfully submitted,

SHERNOFF, SCOTT & BIDART

By: MARIAN HAYCOCK TULLY

Attorneys for Petitioner

APPENDIX A

Supreme Court No.: S003129
Fourth District, Division One, No. D006995
Superior Court No.: 542103
Trial Judge: Honorable Vincent P. DiFiglia

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED
JAN 4 1988
Laurence P. Gill, Clerk

COMMERCIAL LIFE INSURANCE COMPANY
and AUTOMATIC DATA PROCESSING, INC.
Petitioners,

vs.

SUPERIOR COURT OF THE STATE
OF CALIFORNIA FOR THE COUNTY
OF SAN DIEGO,
Respondent.

JOSEPH V. JULIANO,
Real Party-in-Interest.

ALTERNATIVE WRIT OF MANDATE

TO RESPONDENT, SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO:

A petition for review of a decision of the Court of Appeal for the Fourth Appellate District, Division 1, denying a petition for writ of mandate arising out of an

order entered by you in the above cause on September 21, 1987, has been filed in this Court. After reviewing that petition, this Court finds good cause to order that an alternative writ of mandate issue, and to require you to:

(a) Either vacate the September 21, 1987, order in San Diego Superior Court action number 542103 entitled *Joseph V. Juliano v. Automatic Data Processing, Inc., et al.*, denying petitioner's motion for judgment on the pleadings with respect to the fifth count in real party in-interest's complaint, and to enter a new and different order granting said motion,

(b) Or, in the alternative, show cause before this Court in its courtroom, when the proceeding is ordered on calendar, why a peremptory writ of mandate ordering you to do so should not issue.

The written return to the writ is to be served and filed on or before January 19, 1988.

WITNESS the Honorable Malcom M. Lucas, Chief Justice of the Supreme Court of the State of California, attested by my hand and the Seal of this Court this 4th day of January 1988.

LAWRENCE P. GILL
Clerk of the Supreme Court

(Seal)

By: /s/ R. Barrow
Deputy Clerk

APPENDIX B

COPY

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED
DEC 15 1988
Clerk
Deputy

COMMERCIAL LIFE INSURANCE COMPANY, et al.,
Petitioners,
v.
THE SUPERIOR COURT OF SAN DIEGO COUNTY,
Respondent;

JOSEPH V. JULIANO,
Real Party in Interest.

S003129
(Ct. of Appeal No. D006995)
(Super. Ct. No. 542103)

SEE DISSENTING OPINION

We are asked to decide whether the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. § 1001 *et seq.*) preempts a private cause of action brought under California Insurance Code section 790.03, subdivision (h),[1] where the action asserts a claim arising from an employee benefit plan. We conclude that ERISA does preempt such an action.

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[1] Unless otherwise provided, all statutory references are to the Insurance Code.

Joseph V. Juliano's employer sponsored an employee benefit plan insured by Commercial Life Insurance Company and Automatic Data Processing, Inc. (collectively referred to as Commercial). It is undisputed that the plan was the type regulated by ERISA. The benefits under the plan included group term life insurance, accidental death and dismemberment insurance, major medical expense benefits, prescription drug and medicine benefits, and dental care benefits.

Juliano suffered from diabetes, which adversely affected his eyesight. Doctors recommended surgery. Following the surgery, Juliano forwarded his medical bills to Commercial. Commercial refused payment, claiming that the treatment was not covered by the plan because it arose from a preexisting condition.

Juliano brought suit against Commercial. The complaint alleged eight common law causes of action for bad faith, waiver, and estoppel. The complaint also alleged a single statutory cause of action for bad faith under section 790.03, subdivision (h).[2] Commercial

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[2] Section 790.03 provides in pertinent part:

"The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance. [¶] . . . (h) Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices: [¶] (1) Misrepresenting to claimants pertinent facts or insurance policy provisions relating to any coverages at issue. [¶] (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies. [¶] (3) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies. [¶] (4) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss requirements have been completed and submitted by the insured. [¶] (5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which

(continued)

answered the complaint. Then, prior to trial, Commercial filed a motion for judgment on the pleadings,

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(ftn. continued)

liability has become reasonably clear. [¶] (6) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds, when such insureds have made claims for amounts reasonably similar to the amounts ultimately recovered. [¶] (7) Attempting to settle a claim by an insured for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application. [¶] (8) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured, his representative, agent, or broker. [¶] (9) Failing, after payment of a claim, to inform insureds or beneficiaries, upon request by them, of the coverage under which payment has been made. [¶] (10) Making known to insureds or claimants a practice of the insurer of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration. [¶] (11) Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either, to submit a preliminary claim report, and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information. [¶] (12) Failing to settle claims promptly, where liability has become apparent, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage. [¶] (13) Failing to provide promptly a reasonable explanation of the basis relied on in the insurance policy, in relation to the facts or applicable law, for the denial of a claim or for the offer of a compromise settlement. [¶] (14) Directly advising a claimant not to obtain the services of an attorney. [¶] (15) Misleading a claimant as to the applicable statute of limitations."

(continued)

alleging that each cause of action set forth by Juliano was preempted by ERISA. In response, Juliano conceded that *Pilot Life Ins. Co. v. Dedeaux* (1987) __ U.S. __ [107 S.Ct. 1549] compelled the conclusion that his common law causes of action were preempted by ERISA. However, he argued that his statutory cause of action under section 790.03, subdivision (h), was not preempted. The trial court agreed with Juliano and denied Commercial's motion for judgment on the pleadings as to the statutory cause of action for violation of section 790.03, subdivision (h).

Commercial filed a petition for writ of mandate and/or prohibition in the Court of Appeal. The Court of Appeal summarily denied the petition. We granted review and issued an alternative writ.

In his return to the writ, Juliano argues that section 790.03, subdivision (h) is exempt from preemption because it "regulates insurance" within the meaning of ERISA's "saving clause."

I

ERISA comprehensively regulates employee pension and welfare plans. (*Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 732; 29 U.S.C. §§ 1003, 1002.) The act protects interstate commerce and the participants of employee benefit plans by requiring disclosure to participants, establishing standards of conduct and fiduciary duties, and providing for remedies, sanctions, and ready access to federal courts. (29 U.S.C. § 1001(b).) While ERISA imposes upon

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(ftn. continued)

In *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880, we held that private litigants could sue to enforce certain provisions of section 790.03, subdivision (h). However, *Royal Globe* was prospectively overruled in *Moradi-Shalal v. Fireman's Fund Insurance Cos.* (1988) __ Cal.3d __.

benefit plans a variety of substantive requirements relating to participation, funding, and vesting, it contains almost no federal regulation of the substantive terms of benefit plans. (*Metropolitan Life, supra*, 471 U.S. at p. 732.)

ERISA's civil remedies are comprehensive in their scope. A participant or beneficiary of an ERISA plan may bring a civil action for monetary relief from an administrator's failure to provide requested information, or to recover benefits or enforce present or future rights under the terms of the plan. (29 U.S.C. § 1132(a).) Moreover, a participant, beneficiary, or fiduciary may sue to enjoin any act which violates ERISA or the terms of the plan, and may also sue for other equitable relief, or for breach of fiduciary duty. (*Ibid.*) The Secretary of Labor may also bring an action for breach of fiduciary duty, for injunctive or equitable relief, for relief from failure of the administrator to provide information, or to collect any civil penalties under the act. (*Ibid.*)

In addition, ERISA contains detailed provisions for claims enforcement and procedure. (29 U.S.C. §§ 1132, 1133.) Moreover, regulations promulgated by the Department of Labor pursuant to 29 United States Code section 1133 provide specific claims-handling rules and procedures. (29 C.F.R. § 2560.502-1 *et seq.*)

ERISA also contains a broad preemption provision. The "preemption clause" provides: "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975." (29 U.S.C. § 1144(a).) The breadth of the preemption clause is qualified, however, by the "saving clause," which provides in

pertinent part: "[N]othing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." (29 U.S.C. § 1144(b)(2)(A).)

II

Our resolution of this case is aided by previous decisions of the United States Supreme Court. In *Metropolitan Life Ins. Co. v. Massachusetts, supra*, 471 U.S. 724, the Supreme Court addressed the question whether ERISA preempted a Massachusetts statute which required certain minimum mental-health-care benefits to be included in employee health-care plans. The Massachusetts statute regulated the substantive terms of insurance contracts by requiring health-insurance policies to provide, among other things, 60 days of coverage for confinement in a mental hospital and certain minimum outpatient benefits.

Noting that there is a presumption against preemption (*Metropolitan Life, supra*, 471 U.S. at p. 741), the court concluded that the Massachusetts statute was saved from preemption because it regulated insurance within the meaning of ERISA's saving clause.

The court applied the following analysis to determine whether the Massachusetts statute regulated insurance. Initially, the court took a "common sense" view of the matter, concluding that the Massachusetts statute regulated insurance because it controlled the substantive terms of insurance policies. (*Metropolitan Life, supra*, 471 U.S. at p. 740.)

Next, the court applied three criteria adopted by case law to define the "business of insurance" under the McCarran-Ferguson Act (15 U.S.C. § 1011 *et seq.*):[3]

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[3] The McCarran-Ferguson Act pertains to the regulation of insurance. Section 1011 provides: "Congress declares that the

(continued)

" '*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.' " (*Metropolitan Life, supra*, 471 U.S. at p. 743, quoting *Union Labor Life Ins. Co. v. Pireno* (1982) 458 U.S. 119, 129, original emphasis.)

The United States Supreme Court found that all three McCarran-Ferguson factors were satisfied. Addressing the first factor, the court held that the Massachusetts statute "obviously" effected the spreading of risk, because the statute "was intended to effectuate the legislative judgment that the risk of mental-health care should be shared." (*Metropolitan Life, supra*, 471 U.S. at p. 743.) Turning to the second factor, the court held that "mandated-benefit laws directly regulate an integral part of the relationship between the insurer and the policyholder by limiting the type of insurance that an insurer may sell to the policyholder." (*Ibid.*) The third factor was also met, because the Massachusetts statute imposed requirements only on insurers. (*Ibid.*)

The Supreme Court had a further opportunity to determine the scope of ERISA preemption in *Pilot Life Ins. Co. v. Dedeaux, supra*, 107 S.Ct. 1549. *Pilot Life* presented the issue whether ERISA preempted common law tort and contract actions arising from the improper processing of a claim for benefits under an insured employee benefit plan. Everate Dedeaux injured his back while working for Entex, Inc. Dedeaux sought disability benefits under an employee benefit plan insured by Pilot Life Insurance Company (Pilot Life).

(ftn. continued)
continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

Pilot Life terminated Dedeaux's benefits after two years, and Dedeaux brought a diversity suit in federal district court. Dedeaux alleged Mississippi common law claims for fraud, breach of fiduciary duty, and breach of contract. However, he did not assert any of the causes of action available to him under ERISA. Pilot Life moved for summary judgment, arguing that ERISA preempted all of Dedeaux's claims. The district court granted summary judgment, but the circuit court of appeals reversed.

The Supreme Court reversed the court of appeals. Stating that "the express pre-emption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern' " (*Pilot Life, supra*, 107 S.Ct. at p. 1552), the Supreme Court concluded that Dedeaux's claims were preempted. Although the Supreme Court applied the *Metropolitan Life* analysis to support its conclusion, it relied primarily on the "clear expression of congressional intent that ERISA's civil enforcement scheme be exclusive" to find preemption. (*Id.* at p. 1558.)

Proceeding first with the *Metropolitan Life* analysis, the court applied the "common-sense view" to find that the Mississippi common law of bad faith could not be construed as a law that regulated insurance within the meaning of the saving clause. "A common-sense view of the word 'regulates' would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, but be specifically directed toward that industry." (*Pilot Life, supra*, 107 S.Ct. at p. 1554.)

The court next applied the McCarran-Ferguson factors. Regarding the first factor — whether the practice has the effect of spreading policyholder risk — the court determined, without explanation, that unlike the mandated-benefits law in *Metropolitan Life*, the

Mississippi common law did not effect a spreading of policyholder risk. (*Pilot Life, supra*, 107 S.Ct. at p. 1554.) Addressing the second factor — whether the practice is an integral part of the policy relationship between the insurer and the insured — the court stated that the Mississippi common law could perhaps be considered a part of the insurer-insured relationship, but that the connection was attenuated at best. "In contrast to the mandated-benefits law in *Metropolitan Life*, the common law of bad faith does not define the terms of the relationship between the insurer and the insured; it declares only that, whatever terms have been agreed upon in the insurance contract, a breach of that contract may in certain circumstances allow the policyholder to obtain punitive damages." (*Pilot Life, supra*, 107 S.Ct. at p. 1555.) Thus, although the common law could be considered a "part" of the insurer-insured relationship, it could not be considered an "integral" part. (*Ibid.*) Finally, applying the third factor — whether the practice is limited to entities within the insurance industry — the court noted that the common law had general application to all members of the community, and was not directed solely to the insurance industry. (*Ibid.*) The court concluded that the Mississippi common law failed the McCarran-Ferguson test. (*Id.* at pp. 1554-1555.)

The court easily distinguished its *Pilot Life* holding from the holding in *Metropolitan Life*. (*Pilot Life, supra*, 107 S.Ct. at p. 1558.) *Metropolitan Life* did not involve a state law that conflicted with a substantive provision of ERISA, because ERISA — unlike the Massachusetts law in *Metropolitan Life* — "does not regulate the substantive content of welfare-benefit plans." (*Metropolitan Life, supra*, 471 U.S. at p. 732.) However, in *Pilot Life* the common law remedies asserted by Dedeaux conflicted with ERISA's remedies. Therefore, the court in *Pilot Life* went on to determine

whether Congress intended the ERISA remedies to be exclusive.

The Supreme Court concluded that Congress clearly expressed an intent that the civil enforcement provisions of ERISA be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits. (*Pilot Life, supra*, 107 S.Ct. at p. 1555.) The court's determination of exclusivity is supported by the language and structure of ERISA's civil enforcement provisions and by the legislative history of the act.[4] (*Ibid.*) "In sum, the detailed provisions of § 502(a) [of ERISA (29 U.S.C. § 1132)] set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." The court added: "The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive." (*Pilot Life, supra*, 107 S.Ct. at pp. 1556-1557.)

Metropolitan Life and *Pilot Life* provide helpful guidance in this case, but the Supreme Court has not

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[4] The legislative history indicates that Congress intended ERISA to have the same preemptive force as the exclusive remedy provisions of section 301 of the Labor-Management Relations Act (LMRA) (61 Stat. 156, 29 U.S.C. § 185). (*Pilot Life, supra*, 107 S.Ct. at pp. 1555, 1557-1558.) The Supreme Court stated that the powerful pre-emptive force of the LMRA displaced all state actions within its scope. (*Id.* at p. 1557.)

addressed the precise issue posed here. A number of other courts, however, have faced this issue.

Roberson v. Equitable Life Assur. Soc. of U.S. (C.D.Cal. 1987) 661 F.Supp. 416 involved facts almost identical to those at bar. Plaintiff Donald Roberson brought an action in state court against The Equitable Life Assurance Society of the United States (Equitable), alleging that Equitable failed to pay all benefits due under an ERISA-regulated employee benefit plan. Roberson's complaint stated seven common law causes of action. The complaint also stated a single statutory cause of action under section 790.03, subdivision (h), and a single cause of action against his employer, Alpha Microsystems, for ERISA remedies. The defendants removed the case to federal court and moved for summary judgment in light of *Pilot Life*. Roberson conceded that all of his common law claims were preempted by ERISA, but argued that his statutory claim under section 790.03, subdivision (h) was not preempted because section 790.03, subdivision (h) regulates insurance within the meaning of ERISA's saving clause.

The district court applied the analysis set forth in *Metropolitan Life* and *Pilot Life*. The court initially concluded that "common sense" suggested that section 790.03, subdivision (h) regulates insurance. "The most persuasive argument in support of saving the California statute is its obvious connection to regulating insurance. Thus, under the 'common sense' test, it would strain logic to argue that section 790.03(h) is not specifically directed toward the insurance industry." (*Roberson, supra*, 661 F.Supp. at p. 422.)

The court determined, however, that section 790.03, subdivision (h) did not satisfy two of the three McCarran-Ferguson criteria. "First, it would not appear that 790.03(h) has any effect of transferring or spreading policyholder risk. Unlike the Massachusetts

law in *Metropolitan Life*, section 790.03(h) does not purport to regulate the substantive terms or content of insurance policies by mandating benefits. Rather, subsection (h) of section 790.03 primarily is aimed at the procedural aspect of processing and settling claims." (*Roberson, supra*, 661 F.Supp. at p. 422.) Turning to the second McCarran-Ferguson factor, the court stated: "Despite its providing for more specific standards of conduct in processing claims for benefits, section 790.03(h) is not 'integral' to the insurer-insured relationship. Section 790.03(h) does not regulate the terms of the contract itself and hence does not regulate 'the business of insurance' as that term is defined under the McCarran-Ferguson Act." (*Ibid.*) The court determined that section 790.03, subdivision (h) is directed toward the insurance industry, and therefore the third McCarran-Ferguson factor was satisfied. But the court cited authority for the proposition that the satisfaction of only one factor is insufficient. (*Ibid.*, citing *United Food & Commercial Workers v. Pacyga* (9th Cir. 1986) 801 F.2d 1157, 1161.)

Finally, the court in *Roberson* followed *Pilot Life's* holding that ERISA's remedies are exclusive. In *Pilot Life*, "because the civil enforcement provisions of ERISA were intended to provide the exclusive remedies for mishandling of claims, the Mississippi law was in conflict with ERISA and was therefore pre-empted. [¶] The same potential for conflict with ERISA's civil enforcement provisions exists with respect to California Insurance Code Section 790.03(h). . . . Section 790.03(h) . . . provides that either an insured *or* third-party claimant may sue an insurer for engaging in unfair claims settlement practices . . . . Such provisions reach impermissibly beyond the scope of ERISA. *See, e.g. [Massachusetts Mut. Life Ins. Co. v. Russell* (1985) 473 U.S. 134, 145-148] (holding that ERISA does not grant a private right of action for delay in processing benefit claims)." (*Roberson, supra*, 661 F.Supp. at p.

423, original emphasis.) The court concluded: "Thus, even assuming that section 790.03(h) regulates insurance and is therefore within the scope of the saving clause, it must be pre-empted for infringing on the same exclusive civil remedy provisions that were dispositive in *Pilot Life*." (*Roberson, supra*, 661 F.Supp. at p. 424, fn. omitted.)

In *Kanne v. Connecticut General Life Ins. Co.* (9th Cir. 1988) __ F.2d __ (88 Daily Journal D.A.R. 12662), the Ninth Circuit Court of Appeals began where *Roberson* left off: It found the conclusion inescapable that section 790.03, subdivision (h) is preempted under *Pilot Life*. Although the Ninth Circuit stated its general agreement with the *Roberson* opinion (*id.* at p. 12665, fn. 6), it was willing to assume for purposes of its analysis that section "790.03(h) is a law regulating insurance under the savings clause." (*Id.* at p. 12664.)

The *Kanne* court rejected the plaintiffs' argument for limiting *Pilot Life's* preemption holding to only those state laws which do not fall within the savings clause: "To accept this argument, . . . we would have to ignore the second half of *Pilot Life*, 107 S.Ct. 1555-58, in which the Court made abundantly clear that its preemption holding was equally based on its acceptance of the Solicitor General's view that 'Congress clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle for actions asserting improper processing of a claim for benefits.' " (88 Daily Journal D.A.R. at pp. 12664-12665.) The court concluded that it was not possible to read the *Pilot Life* discussion of congressional intent as permitting a state statute like section 790.03, subdivision (h) to supplement the ERISA civil enforcement provisions available to remedy improper claims processing. (*Id.* at

p. 12665.)[5]

Our reading of *Pilot Life* accords with that of the Ninth Circuit in *Kanne*. We are persuaded that section 790.03, subdivision (h) would still be preempted by ERISA even if it were found to be within the scope of the savings clause as a law regulating insurance. This conclusion is compelled by the Supreme Court's discussion of congressional intent, which the court cited as the most significant factor in its determination. (*See Pilot Life Ins. v. Dedeaux, supra*, 107 S.Ct. at p. 1558.)

In *Pilot Life* the Supreme Court held that Congress intended the remedies set forth in ERISA to be the *exclusive* remedies available to ERISA-plan claimants. (*Pilot Life, supra*, 107 S.Ct. at pp. 1555-1557.) However, section 790.03, subdivision (h), as had been

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[5] Other cases have also found preemption. *Lee v. Prudential Ins. Co. of America* (N.D. Cal. 1987) 673 F.Supp. 998 held that although section 790.03, subdivision (h) *does* regulate insurance under the common-sense and McCarran-Ferguson analyses, the statute is nevertheless preempted because ERISA's remedies are exclusive. *Misic v. Building Service Employees Health* (9th Cir. 1986) 789 F.2d 1374 affirmed the dismissal of the plaintiff's state law claims, including a claim under section 790.03, subdivision (h), based on ERISA preemption. *Russell v. Mass. Mut. Life Ins. Co.* (9th Cir. 1983) 722 F.2d 482, reversed on other grounds in *Massachusetts Mut. Life Ins. Co. v. Russell, supra*, 473 U.S. 134, held that the plaintiff's state law claims, including section 790.03, subdivision (h) are preempted by ERISA.

Although some federal courts have determined that section 790.03, subdivision (h) is not preempted by ERISA, those cases were decided prior to *Metropolitan Life* and *Pilot Life* and did not have the benefit of the Supreme Court's guidance on the issue. (*See Eversole v. Metropolitan Life Ins. Co., Inc.* (C.D.Cal. 1980) 500 F.Supp. 1162; *Presti v. Connecticut General Life Ins. Co., Inc.* (N.D.Cal. 1985) 605 F.Supp. 163.)

We are aware that other decisions have been rendered on both sides of the issue presented. Because those decisions are unpublished, they are not discussed here.

interpreted by our decision in *Royal Globe, supra*, 23 Cal.3d 880, provided a private litigant with a cause of action for bad faith settlement practices. (See Part IV, post, p. __' [typed opn. pp. 19-20].) This remedy is not available under ERISA. (*Cf. Massachusetts Mut. Life Ins. Co. v. Russell, supra*, 473 U.S. at pp. 145-148 [private right of action for extracontractual damages is neither expressly nor impliedly available under 29 U.S.C. § 1109, subd. (a)].) Therefore, the remedy available to a private litigant under section 790.03, subdivision (h), conflicts with ERISA's exclusive remedies. This type of conflict was expressly disallowed in *Pilot Life*. (*Pilot Life, supra*, 107 S.Ct. at pp. 1555-1558.) Moreover, in *Pilot Life* the Supreme Court held that Congress's omission of certain remedies was intentional: "The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. 'The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.' " (*Pilot Life, supra*, 107 S.Ct. at p. 1556, quoting *Massachusetts Mut. Life Ins. Co. v. Russell, supra*, 473 U.S. at p. 146, emphasis in original.) We conclude that *Pilot Life's* express holding controls the resolution of this case.[6] *Pilot Life* is directly on point regarding the exclusivity issue, and its conclusion is inescapable.

We find no merit in the argument that if there is any conflict between ERISA remedies and section 790.03,

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[6] In *Pilot Life*, the Supreme Court stated that its analysis regarding the exclusivity of remedies was the most important factor in its determination of preemption. (*Pilot Life, supra*, 107 S.Ct. at p. 1558.)

subdivision (h) remedies, such conflict was created by Congress when it enacted ERISA's preemption clause and saving clause. The argument asserts that the saving clause allows states to regulate insurance and hence to enact conflicting remedies. However, while the saving clause may allow states to enact statutes that regulate the *substantive* terms of insurance policies (*see, Metropolitan Life, supra*, 471 U.S. at pp. 740-744), the clause does not allow states to enact statutes that provide conflicting *procedural remedies* (*see Pilot Life, supra*, 107 S.Ct. at pp. 1555-1558). A contrary rule would undermine ERISA's important policy of promoting uniformity in employee benefit-plan remedies, by creating the potential for conflicting standards of recovery. (*Powell v. Chesapeake & Potomac Telephone Co. of VA.* (4th Cir. 1985) 780 F.2d 419, 422.)

IV

We conclude that ERISA preempts private causes of action under section 790.03, subdivision (h).[7] Of course, our recent decision in *Moradi-Shalal v. Fireman's Fund Ins. Cos., supra*, __ Cal.3d __, prospectively eliminates private causes of action under section 790.03, subdivison (h). Accordingly, our holding of preemption in this case is applicable only to cases which survive *Moradi-Shalal*.

Although our decision in this case prevents Juliano from stating a cause of action for breach of statutory duties under section 790.03, subdivision (h), he nevertheless may amend his complaint to state a claim for ERISA remedies. (*See* 29 U.S.C. § 1132(e)(1) ["State

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[7] We do not decide whether ERISA preempts an action by the Insurance Commissioner to enforce the provisions of the Unfair Practices Act (§ 790 *et seq.*) where such enforcement pertains to a dispute involving an ERISA benefit plan.

courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section"].)

Let a peremptory writ of mandate issue directing the Superior Court of San Diego County to vacate its order denying defendants' motion for judgment on the pleadings as to plaintiff's fifth count for breach of statutory duties under section 790.03, subdivison (h), and to enter a new order consistent with this opinion.

PANELLI, J.

WE CONCUR:

LUCAS, C.J.
ARGUELLES, J.
EAGLESON, J.
KAUFMAN, J.

COPY

COMMERCIAL LIFE INSURANCE COMPANY v. SUPERIOR COURT

S003129

DISSENTING OPINION BY MOSK, J.

I dissent. I strongly disagree not only with the majority's result but also with their reasoning.

I.

With due deference to the United States Supreme Court, I doubt that it gives the bench and bar helpful guidance when it relies on "common sense" as authority for a decision. Nevertheless the High Court has done so in *Pilot Life Ins. Co. v. Dedeaux* (1987) ___ U.S. __ [107 S.Ct. 1549] and the majority herein hold that conclusion to be controlling.

In *Pilot Life*, the court finds a "broad common-sense meaning" (*id.* at p. 1553), a "common-sense view" (*ibid.*), "a common-sense understanding" (*id.* at p. 1554), a "common-sense view" (*ibid.*) and the opinion concludes with a "common-sense understanding" (*id.* at p. 1558).

In reliance on *Pilot Life*, the majority seem to assume that there is some pandemic "common sense" that can guide us in the place of reason and authority. It would indeed be comforting if that were so. But unfortunately it is not: "common sense" is in the eye, or mind, of the beholder.

United States Supreme Court cases have used the term "common sense" in a wide variety of contexts.

Indeed, a cursory count indicates the expression can be found in more than 500 cases over the past 4 decades alone.

For example, the high court has used "common sense" and "subjective" as synonyms. (*See, e.g., United States v. Maine* (1985) 469 U.S. 504, 525.) In other cases, it has equated "common sense" with probability. (*E.g., Basic Inc. v. Levinson* (1988) __ U.S. __, __ [108 S.Ct. 978, 991].) Justice Cardozo wrote of "common-sense accommodation" in *Gully v. First National Bank* (1936) 299 U.S. 109, 117, and in *Monessen Southwestern Ry. Co. v. Morgan* (1988) __ U.S. __, [108 S.Ct. 1837, 1852], reference is made to "common experience or common sense." *Mills v. Maryland* (1988) __ U.S. __, __ [108 S.Ct. 1860, 1875], discusses "a common-sense core of meaning." *United States v. Providence Journal Co.* (1988) __ U.S. __, __ [108 S.Ct. 1502, 1514], discerns a "common sense reading" of a statute, as does *Boos v. Barry* (1988) __ U.S. __, __ [108 S.Ct. 1157, 1162]. *Honig v. Doe* (1988) __ U.S. __, [108 S.Ct. 592, 604], relies on a "common sense proposition." *Carnegie-Mellon University v. Cohill* (1988) __ U.S. __, __ [108 S.Ct. 614, 622], holds a proposition is "confirmed by common sense," and *United Paperworkers Intern. Union v. MISCO, Inc.* (1987) __ U.S. __, __ [108 S.Ct. 364, 374], concludes a judgment is "firmly rooted in common sense." For the ultimate, the court in *Norwest Bank Worthington v. Ahlers* (1988) __ U.S. __, __ [108 S.Ct. 963, 970], found "great common sense." How we are to distinguish between "common sense" and "great common sense" is perplexing.

As a review of the foregoing cases and others like them establishes beyond any dispute, "common sense" is a convenient term. But it is also practically devoid of content.

For instance, in attempting to justify the holding of the court in *Peak v. United States* (1957) 353 U.S. 43, on behalf of the majority Justice Douglas stated, "That seems to us to be the common sense of the matter; and common sense often makes good law." (*Id.* at p. 46.) But Justice Harlan, writing for himself and two others in dissent, drily observed, "Thus is bad law made." (*Id.* at p. 52 [dis. opn. of Harlan, J.].) Can it be said that by disagreeing with the majority on a point of law Justice Harlan and his colleagues were guilty of not using "common sense"? I think not.

In *Roschen v. Ward* (1929) 279 U.S. 337, 339, Justice Holmes declared, "there is no canon against using common sense in construing laws as saying what they obviously mean." Sounds simple. But as Justice Story noted in *Barlow v. United States* (1833) 7 Pet. (32 U.S.) 404, 411, "There is scarcely any law which does not admit of some ingenious doubt." Are the doubters necessarily declining to use "common sense"? I think not.

In *The Kronprinzessin Cecilie* (1917) 244 U.S. 12, Justice Holmes referred to what is apparently a specialized form of "common sense": "Business contracts must be construed with business sense . . . ." (*Id.* at p. 24.) Apparently that did not satisfy the entire court, for Justices Pitney and Clarke dissented. What kind of sense they preferred was not indicated.

Members of the high court have not been altogether unmindful of the problems associated with "common sense." In *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association* (1982) 457 U.S. 702, one of the parties argued that a "common sense" interpretation of a statute should be applied. Said Chief Justice Burger in dissent, "the 'common sense' meaning of a term is not controlling when Congress has provided . . . an explicit definition of a labor dispute. 'Common sense' and legislative history ought not to change the

meaning of unambiguous words of a statute." (*Id.* at p. 727 [dis. opn. of Burger, C.J.].)

In *In re Primus* (1978) 436 U.S. 412, then Justice Rehnquist wrote in dissent that the majority's " 'common-sense' distinction [between speech proposing a commercial transaction and other varieties of speech] is subject to manipulation by clever practitioners." (*Id.* at p. 441 [dis. opn. of Rehnquist, J.].)

In short, I believe that the implied invocation of "common sense" as authority for an opinion of this court is insufficient and as such cannot be helpful to the parties in this case or to the bench and bar in future matters. As Justice Rehnquist explained, the term is "subject to manipulation" and therefore lacks substance.

II.

Real party in interest Joseph V. Juliano (hereinafter Juliano) brought the underlying action for damages against petitioners Commercial Life Insurance Company and Automatic Data Processing, Inc. (hereinafter collectively Commercial Life). In his complaint Juliano alleged in substance that Commercial Life had issued a policy of insurance, sponsored by his employer, establishing an employee welfare benefit plan that provided group term life insurance, accidental death and dismemberment insurance, and benefits for major medical expenses, prescription drugs and medicines, and dental care; he was entitled to benefits for treatment of diabetic retinopathy and was so informed by Commercial Life; he received treatment including ophthalmic surgery; at first, Commercial Life paid a small portion of his medical bills, but then wrongfully refused to pay the rest. Juliano asserted, among other causes of action, a claim that Commercial Life had violated its statutory duties under the Unfair

Trade Practices Act (Ins. Code, § 790 *et seq.*), specifically, Insurance Code section 790.03, subdivision (h) (hereinafter section 790.03(h)).

The majority hold that the Employee Retirement Income Security Act of 1974 (hereinafter ERISA) (88 Stats. 829, as amended, 29 U.S.C. § 1001 *et seq.*) preempts section 790.03(h) as relevant here and thereby bars Juliano's claim under that provision. As will appear, they are wrong.

ERISA regulates, among other matters, "employee welfare benefit plans" that, "through the purchase of insurance or otherwise," provide "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment . . . ." (ERISA § 3(1), 29 U.S.C. § 1002(1).) Within its sphere, ERISA purports to preempt state law. The act states in a preemption clause that its provisions "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." (ERISA § 514(a), 29 U.S.C. § 1144(a).) ERISA, however, may not and does not preempt state law in its entirety. As relevant here, the act declares in a saving clause that "nothing in this [statute] shall be construed to exempt or relieve any person from any law of any State which regulates insurance . . . ." (ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A).)

It is plain that ERISA regulates the plan in which Juliano participated. As stated above, Juliano's employer sponsored a plan providing a variety of insurance coverage and other benefits for its employees.

It is also plain that section 790.03(h) comes within the class of state laws that ERISA purports to preempt. The provision "relate[s] to . . . employee benefit plan[s]" (ERISA § 514(a), 29 U.S.C. § 1144(a)) be defining "unfair claims settlement practices" (Ins. Code, § 790.03, subd. (h)).

But it is plainer still that section 790.03(h) is saved from preemption by the express terms of ERISA: the provision clearly "regulates insurance" (ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A)). As I read their opinion, the majority do not seriously dispute that section 790.03(h) comes within ERISA's saving clause — nor could they (*see Lee v. Prudential Ins. Co. of America* (N.D.Cal. 1987) 673 F.Supp. 998, 1000-1001).

In spite of the foregoing, the majority hold that section 790.03(h) is not saved from preemption and hence that Juliano's claim under the statutory provision is barred. In support they assert that ERISA has established a civil enforcement scheme that provides exclusive remedies. That may be true. But ERISA's scheme defines remedies *for the violation of rights granted employees under the terms of plans within the coverage of the act and under the act itself.* (*See* ERISA § 502(a), 29 U.S.C. § 1132(a).)[1] By contrast, the

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[1] Section 502(a) of ERISA, codified at 29 United States Code section 1132(a), provides as follows.

"A civil action may be brought —

"(1) by a participant or beneficiary —

"(A) for the relief provided for in subsection (c) of this section [concerning requests to the administrator for information], or

"(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

"(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title [for breach of fiduciary duty];

"(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

"(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title

(continued)

Unfair Trade Practices Act, of which section 790.03(h) is a part, has established a civil enforcement scheme that provides remedies *for the breach of duties imposed on insurers under the laws of the State of California.* In a word, the remedies of ERISA may be exclusive in their own sphere, but they do not extend into the sphere occupied by section 790.03(h). (*Cf. Mackey v. Lanier Collections Agency & Service* (1988) __ U.S. __, __ - __ [108 S.Ct. 2182, 2185-2191] [ERISA does not bar a state garnishment action against a covered employee welfare benefit plan: the federal act does not provide an enforcement mechanism for collecting judgments against covered plans and hence does not preempt state law in that area].)

Thus, ERISA does not preempt section 790.03(h), but expressly saves the provision as a law "regulat[ing] insurance." Further, the civil enforcement scheme of the federal statute does not displace the civil enforcement scheme of the state act: the former concerns the rights of employees under covered plans, the latter the duties of insurers under state laws.

III.

There is a growing and ominous trend toward federal preemption of issues that belong within the sphere of control by the individual states. And these inroads into traditional federalism are taking place despite their

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(ftn. continued)
[concerning information to be furnished participants];

"(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

"(6) by the Secretary to collect any civil penalty under subsection (i) of this section [for breach of fiduciary duty]."

inconsistency with pious rhetoric emanating from Washington about returning government to the people at state and local levels.

The first Californian to sit on the United States Supreme Court, Stephen Field, saw the problem clearly as long ago as the period immediately following the Civil War. In *Ex parte Virginia* (1879) 100 U.S. 339, 357, he wrote: "Now, if we look into the Constitution, we shall not find a single word, from its opening to its concluding line, nor in any of the amendments in force before the close of the civil war, nor . . . in those subsequently adopted, which authorizes any interference by Congress with the States in the administration of their governments, and the enforcement of their laws with respect to any matter over which jurisdiction was not surrendered to the United States. The design of its framers was not to destroy the States, but to form a more perfect union between them, and, whilst creating a central government for certain great purposes, to leave to the States in all matters the jurisdiction of which was not surrendered the functions essential to separate and independent existence."

Justice Field took the same position in *Virginia v. Rives* (1879) 100 U.S. 313, 337: "It is difficult to believe that the wise men who sat in the convention which framed the Constitution and advocated its adoption ever contemplated the possibility of a State being required to assert its authority over offenders against its laws in other tribunals than those of its own creation, and least of all in an inferior tribunal of the new government. I do not think I am going too far in asserting that had it been supposed a power so dangerous to the independence of the States, and so calculated to humiliate and degrade them, lurked in any of the provisions of the Constitution, that instrument would never have been adopted."

In the instant case we have a state regulatory statute at issue. In the *Sinking-Fund Cases* (1879) 99 U.S. 700, a state-created corporation was involved. On that subject Justice Field was emphatic: "In a word, the law of the State undertakes to control and manage the corporation, in all particulars required for the service, convenience, and protection of the public; and can there be a doubt in the mind of any one that over its own creations the State has, within its own territory, as against the United States, the superior authority? . . . Under the Constitution the management of local affairs is left chiefly to the States, and it never entered into the conception of its framers that under it the creations of the States could be taken from their control." (*Id.* at pp. 768-769.)

In our case the law regulating insurance was brought into existence by the State. Under these circumstances it could not have been contemplated, within constitutional limitations, that enforcement of this state creation should pass exclusively to Washington.

IV.

In conclusion, I would hold that Juliano's section 790.03(h) cause of action is not barred. Accordingly, I dissent.

MOSK, J.

I CONCUR: BROUSSARD, J.

APPENDIX C

COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

FILED
Keenan G. Casady, Clerk
NOV 3 1987
Court of Appeal Fourth District

COMMERCIAL LIFE INSURANCE COMPANY, et al.,
Petitioner,
v.
SUPERIOR COURT, etc.,
COUNTY OF SAN DIEGO,
Respondent.

D006995
(Super. Ct. No. 542103)

JOSEPH V. JULIANO,
Real Party in Interest.

THE COURT:

The petition for writ of mandate has been read and considered by Presiding Justice Kremer and Justices Work and Todd. The petition is denied. (*Goodrich v. General Telephone Co. of Calif. et al.* (Sept. 22, 1987, B020532) [87 Daily Journal D.A.R. 6766].)

/s/ Work
WORK, Acting P.J.

Copies to: All Parties

APPENDIX D

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

Number: 542103 Reporter: Patricia E. Lux
1:30 P.M. ← Court convenes at Clerk: Mary Rademaker
Date: MONDAY, SEPTEMBER 21, 1987
Judge: HON. VINCENT P. Di FIGLIA
Dept.: 35
Plaintiff/Petitioner: JOSEPH V. JULIANO
Attorney for Plaintiff/Petitioner: /s/ TOM LA VOY
Defendant/Respondent: AUTOMATIC DATA PROCESSING, INC.,
Attorney for Defendant/Respondent: /s/ CURTIS METZGER (COMMERCIAL LIFE INSURANCE COMPANY AND AUTOMATIC DATA PROCESSING, INC.)

DEFTS MOTION FOR JUDGMENT ON THE PLEADINGS ON BEHALF OF DEFTS COMMERICAL LIFE INSURANCE COMPANY AND AUTOMATIC DATA PROCESSING, INC AND AGAINST PLTFS JOSEPH V. JULIANO

(NOTE: IRRELEVANT COURT FORM INFORMATION OMITTED.)

OTHER: Motion to Strike granted as to all causes of action except 5 without leave

Form 203 Co. Clk (8/83) Minutes Cal No. 8

Supreme Court, U.S.
FILED
APR 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH V. JULIANO,

Petitioner,

v.

COMMERCIAL LIFE INSURANCE COMPANY and AUTOMATIC DATA PROCESSING, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTIONS PRESENTED

1. Should the United States Supreme Court grant certiorari when there remains a factual issue of whether the parties entered into a settlement agreement that resolved all of the issues in the case?

2. Does the Employee Retirement Income Security Act preempt private causes of action under California Insurance Code Section 790.03(h) for alleged improper processing of a claim under an employee benefit plan?

PARTIES TO THE PROCEEDING

1. Respondent Commercial Life Insurance Company is a wholly-owned subsidiary of Unum Corp.

2. Respondent Automatic Data Processing, Inc. has changed its name to Settlement Options, Inc., which is a wholly-owned subsidiary of CPI Group. CPI Group, in turn, is a wholly-owned subsidiary of The Continental Corp.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THERE IS NO CONFLICT AMONG THE CIRCUITS OR STATE COURTS CONCERNING ERISA PREEMPTION	7
II. THE CALIFORNIA SUPREME COURT DECISION HAS LITTLE IMPACT ON FUTURE CLAIMS	10
III. THE CASE IS NOT RIPE IN LIGHT OF THE ALLEGED SETTLEMENT OF ALL OF THE CLAIMS	11
IV. THE CALIFORNIA SUPREME COURT'S DECISION IS SUPPORTED BY ALL KNOWN PRECEDENT	12
CONCLUSION	14
APPENDIX A	1a
OPINION IN *COMMERCIAL LIFE INS. CO. V. JULIANO*, NO. S003129 (CAL. DEC. 15, 1988)	
APPENDIX B	27a
CORRESPONDENCE BETWEEN ATTORNEYS REGARDING SETTLEMENT OF *JULIANO V. AUTOMATIC DATA PROCESSING, INC.* (CIVIL ACTION NO. 542103)	
APPENDIX C	31a
UNITED STATES' *AMICUS CURIAE* BRIEF IN *KANNE V. CONNECTICUT GEN. LIFE INS. CO.*, 867 F.2D 489 (9TH CIR. 1989)	

TABLE OF AUTHORITIES

Cases	Page
Aetna Life Ins. Co. v. Borges, 1989 U.S. App. LEXIS 2407 (2d Cir. 1989)	4
Amos v. Blue Cross-Blue Shield of Ala., 1989 U.S. App. LEXIS 3684 (11th Cir. 1989)	8
Anschultz v. Connecticut Gen. Life Ins. Co., 850 F.2d 1467 (11th Cir. 1988)	8
Coleman v. Balkcom, 451 U.S. 949 (1981)	10
Commercial Life Ins. Co. v. Juliano, No. S003129 (Cal. Dec. 15, 1988)	7
Desmarais v. Joy Mfg. Co., 538 A.2d 1218 (N.H. 1988)	8
Hammond Clock Co. v. Schiff, 293 U.S. 529 (1934)	11
Hoo v. United States, ___ U.S. ___ ,108 S. Ct. 742 (1988)	9
Hood v. Prudential Ins. Co., 522 So.2d 265 (Ala. 1988)	8
In re Life Ins. Co. of N. Am., 857 F.2d 1190 (8th Cir. 1988)	8,9
Kanne v. Connecticut Gen. Life Ins. Co., 867 F.2d 489 (9th Cir. 1989)	6,8,9,12,13
Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)	3
Moradi-Shalal v. Fireman's Fund Ins. Cos., 758 P.2d 58 (Cal. 1988)	3,10
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S. Ct. 1549 (1987)	*passim*
Roberson v. Equitable Life Assurance Soc'y, 1989 U.S. App. LEXIS 2024 (9th Cir. 1989), *aff'g without op.*, 661 F. Supp. 416 (C.D. Cal. 1987	6,9,12
Sampson v. Mutual Benefit Life Ins. Co., 863 F.2d 108 (1st Cir. 1988)	8

Table of Authorities Continued

	Page
United States v. Alaska, 253 U.S. 113 (1920)	11
United States v. Johnston, 268 U.S. 220 (1925)	11

Federal Statutes

29 U.S.C. § 1132 (a)	2
29 U.S.C. § 1144(a)	2
29 U.S.C. § 1144(b)(2)(A).	2

State Statutes

California Insurance Code Section 790.03(h) ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1530

JOSEPH V. JULIANO,

Petitioner,

v.

COMMERCIAL LIFE INSURANCE COMPANY and AUTOMATIC DATA PROCESSING, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION

Commercial Life Insurance Company and Automatic Data Processing, Inc., respondents, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the decision of the California Supreme Court.

COUNTERSTATEMENT OF THE CASE

Petitioner filed a complaint in a California state court contesting the way his claims for health insurance coverage were processed by respondents. The health insurance was part of an employee benefit plan that both sides agree is covered by the Employee

Retirement Security Income Act of 1974 ("ERISA"). ERISA is a federal statute that sets forth various standards for employee benefit plans. ERISA imposes upon employee benefit plans a variety of substantive requirements relating to participation in and funding of such plans. ERISA also sets forth comprehensive civil remedies available to participants or beneficiaries for ERISA violations. *See* 29 U.S.C. § 1132(a). ERISA contains a broad preemption provision. 29 U.S.C. § 1144(a). There is an exception to preemption in the ERISA statute for laws that regulate insurance. 29 U.S.C. § 1144(b)(2)(A).

Petitioner's complaint alleged eight common law claims and one statutory claim of bad faith relating to respondents' processing of petitioner's claims for the health benefits. The eight common law claims were dismissed because they are preempted by ERISA. Petitioner does not contest the dismissal of these eight common law claims. The statutory claim was asserted pursuant to Section 790.03(h) of the California Insurance Code. Section 790.03(h) identifies certain improper insurance claim practices. Petitioner alleged that respondents violated this statute in handling petitioner's claims. Respondent filed a writ of mandamus with the California Supreme Court seeking dismissal of petitioner's claim under Section 790.03(h) as preempted by ERISA.

On December 15, 1988, the California Supreme Court determined that petitioner's private right of action under Section 790.03(h) was preempted by ERISA.[1] (A copy of the decision is attached hereto as

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[1] In 1979, the California Supreme Court had determined that Section 790.03 allowed a private right of action against an in-

Appendix A). The California Supreme Court applied this Court's 1987 decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549 (1987), which set forth the standard for determining ERISA preemption. In *Pilot Life*, this Court established a two-part test to determine whether ERISA preempted state claims. First, it must be determined whether the state law at issue actually regulates the business of insurance or merely relates to insurance companies. *Pilot Life*, 107 S. Ct. at 1554.[2] Petitioner does not contest the propriety of this test, only its specific application. The second part of *Pilot Life* establishes preemption of all civil claims asserting improper processing of claims for ERISA benefits even if the law is part of a state insurance regulatory scheme. This Court concluded that the civil enforcement provisions of ERISA were the exclusive means of contesting improper claims processing. *Id.* at 1555. Petitioner contests the scope of this portion of the *Pilot Life* decision as interpreted by the California Supreme Court.

The California Supreme Court's decision was based upon an application of this two-part test. First, the California Supreme Court found that Section 790.03(h)

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surance company which violated the claims practices procedures set forth in the statute. Subsequent to the filing of this case, the California Supreme Court determined that such a right of private action did not exist. Moradi-Shalal v. Fireman's Fund Ins. Cos., 758 P.2d 58 (Cal. 1988). The decision proscribed any future claims under this California statute, but allowed claims filed prior to its decision to continue.

[2] To establish whether a state law regulates or is merely related to the business of insurance, this Court reaffirmed and relied upon its earlier decision in Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985).

of the California Insurance Code was not a statute regulating the business of insurance. The court recognized that the statute had an impact upon insurance companies but did not regulate the business of insurance. Courts have consistently recognized that the "laws that have been ruled preempted are those that provide an alternative cause of action to employees to collect benefits . . . [t]hose that have not been preempted are laws of general application—often traditional exercises of state power or regulatory authority—whose effect upon ERISA plans is incidental." *Aetna Life Ins. Co. v. Borges*, 1989 U.S. App. LEXIS 2407, 2407,12-13 (2d Cir. 1989). Applying this distinction, the California Supreme Court ruled that Section 790.03(h) of the California Insurance Code did not regulate insurance by such traditional means as requiring a spreading of risk, insisting on minimal coverages, or dictating certain relationships between the insured and the insurer. As a result, the California Supreme Court held that the broad preemption under ERISA applied and that Section 790.03(h) of the California Insurance Code did not fall within the limited exception to ERISA preemption for state insurance regulations.

In addition, the California Supreme Court found preemption under the second part of this Court's decision in *Pilot Life*. Section 790.03(h) of the California Insurance Code regulated claims procedures. The California Supreme Court, applying the standards set forth in *Pilot Life*, ruled that ERISA had established the exclusive civil remedies for improper claims procedures preempting all claims for improper procedures arising under state law including Section 790.03(h) of the California Insurance Code. The court

remanded the case to allow entry of the order and to provide petitioner with an opportunity to amend the complaint to assert claims for relief under ERISA. In fact, petitioner has filed a suit asserting his ERISA claims that is now pending before a California state trial court.

After the California Supreme Court decision, but prior to filing the petition for a writ of certiorari, petitioner settled his claim. An oral agreement was reached between the parties. Specifically, petitioner made a settlement offer through his counsel which respondents accepted. The settlement was acknowledged in correspondence between counsel. (*See* Appendix B for copies of the letters.) Subsequent to that settlement, petitioner attempted to renege on the settlement agreement. As a result, petitioner recently filed this petition for a writ of certiorari and has asserted ERISA claims before the trial court in California. The settlement will be pleaded as an affirmative defense to petitioner's ERISA claims. Accordingly, petitioner will have a full opportunity to test the effects of his settlement in his current ERISA case.

SUMMARY OF ARGUMENT

1. The California Supreme Court decision is consistent with every known decision of the United States Circuit Courts of Appeals and the courts of last resort for those states that have addressed the issue of ERISA preemption since this Court's 1987 decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549 (1987). In fact, petitioner does not seek review because of any conflict or confusion among the circuits or states. Rather, petitioner complains only

that he is not satisfied with the consistent interpretation of ERISA preemption as set forth by this Court in *Pilot Life*. This is an inadequate justification for a granting certiorari. To the contrary, because there are no conflicts among the courts in applying the ERISA preemption, no review by certiorari is warranted.

2. The private right of action under Section 790.03(h) of the California Insurance Code no longer exists. Accordingly, review is imprudent given the lack of prospective relief and the concomitant limited impact a decision by this Court would have on future claims.

3. In light of the settlement issue, this case is not ripe for this Court's review. At a minimum, there remains a factual issue over whether the settlement reached in this matter is valid and enforceable. This factual issue is not appropriate for review upon a petition for a writ of certiorari. If determined to be enforceable, the settlement would render this appeal moot.

4. The California Supreme Court decision was correct and is supported by all applicable precedent. In fact, the United States Court of Appeals for the Ninth Circuit has found in two recent decisions that this very statute, Section 790.03(h) of the California Insurance Code, is preempted by ERISA. *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1989); *Roberson v. Equitable Life Assurance Soc'y*, 1989 U.S. App. LEXIS 2024 (9th Cir. 1989), *aff'g without op.*, 661 F. Supp. 416 (C.D. Cal. 1987) (in which the district court dismissed claims under Section 790.03(h) of the California Insurance Code as preempted by ERISA).

ARGUMENT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS OR STATE COURTS CONCERNING ERISA PREEMPTION

The California Supreme Court, applying this Court's ruling in 1987 in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549 (1987), held that petitioner's statutory claim under Section 790.03(h) of the California Insurance Code is preempted by ERISA. This decision is consistent with the decisions of all the federal and state appeals courts that have considered the scope of ERISA preemption under the *Pilot Life* decision. Petitioner seeks review through this petition for a writ of certiorari not because the California Supreme Court decision is inconsistent with other courts interpretation, but because he is not satisfied with the consistent application by all the appellate courts of the *Pilot Life* ruling.

The California Supreme Court specifically ruled that where state law claims concern improper processing of a claim for benefits, "Congress intended the remedies set forth in ERISA to be the *exclusive* remedies available to ERISA-plan claimants." *Commercial Life Ins. Co. v. Juliano*, No. S003129, slip op. at 17 (Cal. Dec. 15, 1988) (Appendix A at 14a). Section 790.03(h), which identifies improper claims procedures, was therefore preempted by ERISA.

Since this Court's *Pilot Life* decision in 1987, a number of courts have had an opportunity to apply that decision to preemption issues under ERISA. Specifically, several circuit courts of appeals have considered whether ERISA preempts state law claims for allegedly improperly handled claims. Following this Court's clear precedent, "[e]very court to have con-

sidered the question since *Pilot Life* was decided has reached the same conclusion." *In re Life Ins. Co. of N. Am.*, 857 F.2d 1190, 1194 (8th Cir. 1988). The circuit courts have found preemption whether the claims were asserted under state common law or state statutory law. *E.g., Amos v. Blue Cross-Blue Shield of Ala.*, 1989 U.S. App. LEXIS 3684, 3684,6 (11th Cir. 1989) (holding that "the preemptive force of ERISA is so powerful that it completely displaces state law claims."); *In re Life Ins. Co. of N. Am.*, 857 F.2d at 1194 (dismissing state common law claims and a claim under a Missouri statute that prohibited a "vexatious refusal to pay" insurance benefits); *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1989) (finding the same California statute, Section 790.03(h) of the California Insurance Code, that is under review in this petition to be preempted); *Sampson v. Mutual Benefit Life Ins. Co.*, 863 F.2d 108, 110 (1st Cir. 1988) (holding that Massachusetts law is preempted by ERISA); *Anschultz v. Connecticut Gen. Life Ins. Co.*, 850 F.2d 1467 (11th Cir. 1988) (finding that Florida common law and statutory claim for improper claim processing preemption ERISA).

Similarly, the courts of final appeal in those states that have considered preemption have all ruled that state claims arising out of the processing of insurance claims of ERISA programs are preempted. *E.g., Hood v. Prudential Ins. Co.*, 522 So.2d 265 (Ala. 1988) (affirming lower court's ruling that ERISA preempted Alabama claims for bad faith refusal to pay an insurance claim); *Desmarais v. Joy Mfg. Co.*, 538 A.2d 1218 (N.H. 1988) (holding that ERISA preempts claims under New Hampshire Common Law). The Cal-

ifornia Supreme Court's decision in this case is consistent with the decision of other courts.

The California Supreme Court decision in this case is also supported by two recent decisions of the United States Court of Appeals for the Ninth Circuit's finding preemption of the very same State of California statutes. *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1989) and *Roberson v. Equitable Life Assurance Soc'y*, 1989 U.S. App. LEXIS 2024 (9th Cir. 1989), *aff'g without op.*, 661 F. Supp. 416 (C.D. Cal. 1987). In both cases, the court ruled that private causes of action under Section 790.03(h) of the California Insurance Code are preempted by ERISA.

The consistency of the decisions indicates that grant of certiorari and review of this case would serve little purpose. This Court's decisions concerning preemption of ERISA, as set down in *Pilot Life*, provide clear guidance to the lower courts. As the Eighth Circuit articulated in *In re Life Ins. Co. of N. Am.*, 857 F.2d 1190, 1194, "the Court in *Pilot Life* could not have stated with any greater clarity that the remedies afforded under ERISA are exclusive, and no state law purporting to supply additional remedies will escape the preemptive effect of § 44(a) as laws 'which regulate insurance' under [ERISA]." This clarity is attested to by the consistency among the circuit and state courts in applying the holding in *Pilot Life*. Absent the need to clarify or deal with the conflicts, certiorari should not be granted. *See Hoo v. United States*, ___ U.S. ___, 108 S. Ct. 742 (1988).

II. THE CALIFORNIA SUPREME COURT DECISION HAS LITTLE IMPACT ON FUTURE CLAIMS

Certiorari is inappropriate here because the decision in this case will have minimal impact. This case deals with preemption of a private right of action under Section 790.03(h) of the California Insurance Code. The California Supreme Court has ruled that Section 790.03(h) does not provide a private right of action. In overruling an earlier precedent, the California Supreme Court, in *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 758 P.2d 58 (Cal. 1988), abolished any private right of action under California Insurance Code Section 790.03(h). The court held that its decision applied only to cases filed subsequent to the decision, allowing claims filed prior to the date of the *Moradi-Shalal* decision, August 18, 1988, to go forward.

As a result, the issue of preemption of Section 790.03(h) of the California Insurance Code is now moot for all future claims. A decision by this Court would have a direct effect only on those few cases filed before August 18, 1988 that are and will continue to be pending. If this Court were to grant certiorari in the present case, the impact would extend little beyond the petitioner himself. Such limited precedential value provides further reason why this Court should not grant certiorari. *See Coleman v. Balkcom*, 451 U.S. 949, 956 (1981) ("The questions presented in the petition are of importance only to petitioner himself and therefore are not suitable candidates for the exercise of our discretionary jurisdiction.") (Rehnquist, J., dissenting).

III. THE CASE IS NOT RIPE IN LIGHT OF THE ALLEGED SETTLEMENT OF ALL OF THE CLAIMS

At a minimum, there is a factual dispute over whether all of the claims that gave rise to petitioner's cause of action have been settled. Prior to filing the petition for a writ of certiorari, an oral settlement was reached between the counsel to the parties. Subsequent to that settlement, petitioner reneged on the settlement, sought this writ of certiorari, and pursued his ERISA claims arising out of the same facts that gave rise to the claim now before this Court. (*See* Appendix B for correspondence concerning the settlement.) The effects of the settlement upon petitioner's claim will be fully adjudicated by the California trial court. The settlement is an affirmative defense which will be raised by the respondents when their answer is due in that matter.

If this settlement is held to be valid and enforceable, all of petitioner's claims, including his claims for which he now seeks review by this Court, will be resolved, and the issues before this Court rendered moot. Certiorari should be denied where a settlement rendered petitioner's claim moot. *E.g.*, *Hammond Clock Co. v. Schiff*, 293 U.S. 529, 530 (1934) (*per curiam*); *United States v. Alaska*, 253 U.S. 113, 116 (1920). At a minimum, this settlement issue raises significant factual questions that preclude granting certiorari. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) (ruling that the Supreme Court does "not grant a certiorari to review evidence and discuss specific facts.").

IV. THE CALIFORNIA SUPREME COURT'S DECISION IS SUPPORTED BY ALL KNOWN PRECEDENT

The California Supreme Court's decision in this case is correct and is supported by all available precedent. Two recent decisions of the United States Court of Appeals for the Ninth Circuit held that the same statute, Section 790.03(h) of the California Insurance Code, is preempted by ERISA. In a decision rendered prior to the California Supreme Court's decision at issue here, the United States Court of Appeals for the Ninth Circuit held that ERISA preempted a cause of action concerning improper claims processing under Section 790.03(h) of the California Insurance Code. *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1989). The court in *Kanne* specifically held that:

> [T]he Court [in *Pilot Life*] made abundantly clear that its preemption holding was equally based on its acceptance of the Solicitor General's view that "Congress clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing a claim for benefits."

Id. at 494 (citing *Pilot Life*, 107 S. Ct. at 1555). The Ninth Circuit concluded that "under *Pilot Life* we find the conclusion inescapable that § 790.03(h) is preempted by ERISA." *Id.* at 493. In a ruling rendered after the California Supreme Court's decision here, *Roberson v. Equitable Life Assurance Soc'y*, 1989 U.S. App. LEXIS 2024 (9th Cir. 1989), *aff'g without op.*, 661 F. Supp. 416 (C.D. Cal. 1987), the United States Court of Appeals for the Ninth Circuit affirmed without opinion the district court's holding that Section 790.03(h) of the California Insurance Code is preempted by ERISA.

The California Supreme Court's decision is also supported by the United States Solicitor of Labor, who filed an *amicus curiae* brief before the United States Court of Appeals for the Ninth Circuit in the *Kanne* case. In that brief, the Solicitor supported the position that Section 790.03(h) of the California Insurance Code was preempted by ERISA. (A copy of the brief is attached hereto as Appendix C.)

As a result, the substantive decision of the California Supreme Court is consistent with this Court's decision in *Pilot Life*. That decision is supported by decisions of the United States Court of Appeals for the Ninth Circuit dealing with the very same statute and by decisions of other Circuit Courts of Appeals and state courts that have addressed the issue. No further review is warranted.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari be denied.

Dated: April 14, 1989
Washington, D.C.

Respectfully submitted,

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APPENDIX A

COPY

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED
DEC 15 1988
Clerk
Deputy

COMMERCIAL LIFE INSURANCE COMPANY, et al.,
Petitioners,
v.
THE SUPERIOR COURT OF SAN DIEGO COUNTY,
Respondent;

JOSEPH V. JULIANO,
Real Party in Interest.

S003129
(Ct. of Appeal No. D006995)
(Super. Ct. No. 542103)

SEE DISSENTING OPINION

We are asked to decide whether the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. § 1001 *et seq.*) preempts a private cause of action brought under California Insurance Code section 790.03, subdivision (h),[1] where the action asserts a claim arising from an employee benefit plan. We conclude that ERISA does preempt such an action.

[1] Unless otherwise provided, all statutory references are to the Insurance Code.

Joseph V. Juliano's employer sponsored an employee benefit plan insured by Commercial Life Insurance Company and Automatic Data Processing, Inc. (collectively referred to as Commercial). It is undisputed that the plan was the type regulated by ERISA. The benefits under the plan included group term life insurance, accidental death and dismemberment insurance, major medical expense benefits, prescription drug and medicine benefits, and dental care benefits.

Juliano suffered from diabetes, which adversely affected his eyesight. Doctors recommended surgery. Following the surgery, Juliano forwarded his medical bills to Commercial. Commercial refused payment, claiming that the treatment was not covered by the plan because it arose from a preexisting condition.

Juliano brought suit against Commercial. The complaint alleged eight common law causes of action for bad faith, waiver, and estoppel. The complaint also alleged a single statutory cause of action for bad faith under section 790.03, subdivision (h).[2] Commercial

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[2] Section 790.03 provides in pertinent part:

"The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance. [¶] . . . (h) Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices: [¶] (1) Misrepresenting to claimants pertinent facts or insurance policy provisions relating to any coverages at issue. [¶] (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies. [¶] (3) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies. [¶] (4) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss requirements have been completed and submitted by the insured. [¶] (5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which

(continued)

answered the complaint. Then, prior to trial, Commercial filed a motion for judgment on the pleadings,

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(ftn. continued)

liability has become reasonably clear. [¶] (6) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds, when such insureds have made claims for amounts reasonably similar to the amounts ultimately recovered. [¶] (7) Attempting to settle a claim by an insured for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application. [¶] (8) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured, his representative, agent, or broker. [¶] (9) Failing, after payment of a claim, to inform insureds or beneficiaries, upon request by them, of the coverage under which payment has been made. [¶] (10) Making known to insureds or claimants a practice of the insurer of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration. [¶] (11) Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either, to submit a preliminary claim report, and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information. [¶] (12) Failing to settle claims promptly, where liability has become apparent, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage. [¶] (13) Failing to provide promptly a reasonable explanation of the basis relied on in the insurance policy, in relation to the facts or applicable law, for the denial of a claim or for the offer of a compromise settlement. [¶] (14) Directly advising a claimant not to obtain the services of an attorney. [¶] (15) Misleading a claimant as to the applicable statute of limitations."

(continued)

alleging that each cause of action set forth by Juliano was preempted by ERISA. In response, Juliano conceded that *Pilot Life Ins. Co. v. Dedeaux* (1987) __ U.S. __ [107 S.Ct. 1549] compelled the conclusion that his common law causes of action were preempted by ERISA. However, he argued that his statutory cause of action under section 790.03, subdivision (h), was not preempted. The trial court agreed with Juliano and denied Commercial's motion for judgment on the pleadings as to the statutory cause of action for violation of section 790.03, subdivision (h).

Commercial filed a petition for writ of mandate and/or prohibition in the Court of Appeal. The Court of Appeal summarily denied the petition. We granted review and issued an alternative writ.

In his return to the writ, Juliano argues that section 790.03, subdivision (h) is exempt from preemption because it "regulates insurance" within the meaning of ERISA's "saving clause."

I

ERISA comprehensively regulates employee pension and welfare plans. (*Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 732; 29 U.S.C. §§ 1003, 1002.) The act protects interstate commerce and the participants of employee benefit plans by requiring disclosure to participants, establishing standards of conduct and fiduciary duties, and providing for remedies, sanctions, and ready access to federal courts. (29 U.S.C. § 1001(b).) While ERISA imposes upon

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(ftn. continued)

In *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880, we held that private litigants could sue to enforce certain provisions of section 790.03, subdivision (h). However, *Royal Globe* was prospectively overruled in *Moradi-Shalal v. Fireman's Fund Insurance Cos.* (1988) __ Cal.3d __.

benefit plans a variety of substantive requirements relating to participation, funding, and vesting, it contains almost no federal regulation of the substantive terms of benefit plans. (*Metropolitan Life, supra*, 471 U.S. at p. 732.)

ERISA's civil remedies are comprehensive in their scope. A participant or beneficiary of an ERISA plan may bring a civil action for monetary relief from an administrator's failure to provide requested information, or to recover benefits or enforce present or future rights under the terms of the plan. (29 U.S.C. § 1132(a).) Moreover, a participant, beneficiary, or fiduciary may sue to enjoin any act which violates ERISA or the terms of the plan, and may also sue for other equitable relief, or for breach of fiduciary duty. (*Ibid.*) The Secretary of Labor may also bring an action for breach of fiduciary duty, for injunctive or equitable relief, for relief from failure of the administrator to provide information, or to collect any civil penalties under the act. (*Ibid.*)

In addition, ERISA contains detailed provisions for claims enforcement and procedure. (29 U.S.C. §§ 1132, 1133.) Moreover, regulations promulgated by the Department of Labor pursuant to 29 United States Code section 1133 provide specific claims-handling rules and procedures. (29 C.F.R. § 2560.502-1 *et seq.*)

ERISA also contains a broad preemption provision. The "preemption clause" provides: "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975." (29 U.S.C. § 1144(a).) The breadth of the preemption clause is qualified, however, by the "saving clause," which provides in

pertinent part: "[N]othing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." (29 U.S.C. § 1144(b)(2)(A).)

II

Our resolution of this case is aided by previous decisions of the United States Supreme Court. In *Metropolitan Life Ins. Co. v. Massachusetts, supra*, 471 U.S. 724, the Supreme Court addressed the question whether ERISA preempted a Massachusetts statute which required certain minimum mental-health-care benefits to be included in employee health-care plans. The Massachusetts statute regulated the substantive terms of insurance contracts by requiring health-insurance policies to provide, among other things, 60 days of coverage for confinement in a mental hospital and certain minimum outpatient benefits.

Noting that there is a presumption against preemption (*Metropolitan Life, supra*, 471 U.S. at p. 741), the court concluded that the Massachusetts statute was saved from preemption because it regulated insurance within the meaning of ERISA's saving clause.

The court applied the following analysis to determine whether the Massachusetts statute regulated insurance. Initially, the court took a "common sense" view of the matter, concluding that the Massachusetts statute regulated insurance because it controlled the substantive terms of insurance policies. (*Metropolitan Life, supra*, 471 U.S. at p. 740.)

Next, the court applied three criteria adopted by case law to define the "business of insurance" under the McCarran-Ferguson Act (15 U.S.C. § 1011 *et seq.*):[3]

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[3] The McCarran-Ferguson Act pertains to the regulation of insurance. Section 1011 provides: "Congress declares that the

(continued)

" '*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.' " (*Metropolitan Life, supra*, 471 U.S. at p. 743, quoting *Union Labor Life Ins. Co. v. Pireno* (1982) 458 U.S. 119, 129, original emphasis.)

The United States Supreme Court found that all three McCarran-Ferguson factors were satisfied. Addressing the first factor, the court held that the Massachusetts statute "obviously" effected the spreading of risk, because the statute "was intended to effectuate the legislative judgment that the risk of mental-health care should be shared." (*Metropolitan Life, supra*, 471 U.S. at p. 743.) Turning to the second factor, the court held that "mandated-benefit laws directly regulate an integral part of the relationship between the insurer and the policyholder by limiting the type of insurance that an insurer may sell to the policyholder." (*Ibid.*) The third factor was also met, because the Massachusetts statute imposed requirements only on insurers. (*Ibid.*)

The Supreme Court had a further opportunity to determine the scope of ERISA preemption in *Pilot Life Ins. Co. v. Dedeaux, supra*, 107 S.Ct. 1549. *Pilot Life* presented the issue whether ERISA preempted common law tort and contract actions arising from the improper processing of a claim for benefits under an insured employee benefit plan. Everate Dedeaux injured his back while working for Entex, Inc. Dedeaux sought disability benefits under an employee benefit plan insured by Pilot Life Insurance Company (Pilot Life).

(ftn. continued)
continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

Pilot Life terminated Dedeaux's benefits after two years, and Dedeaux brought a diversity suit in federal district court. Dedeaux alleged Mississippi common law claims for fraud, breach of fiduciary duty, and breach of contract. However, he did not assert any of the causes of action available to him under ERISA. Pilot Life moved for summary judgment, arguing that ERISA preempted all of Dedeaux's claims. The district court granted summary judgment, but the circuit court of appeals reversed.

The Supreme Court reversed the court of appeals. Stating that "the express pre-emption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern' " (*Pilot Life, supra*, 107 S.Ct. at p. 1552), the Supreme Court concluded that Dedeaux's claims were preempted. Although the Supreme Court applied the *Metropolitan Life* analysis to support its conclusion, it relied primarily on the "clear expression of congressional intent that ERISA's civil enforcement scheme be exclusive" to find preemption. (*Id.* at p. 1558.)

Proceeding first with the *Metropolitan Life* analysis, the court applied the "common-sense view" to find that the Mississippi common law of bad faith could not be construed as a law that regulated insurance within the meaning of the saving clause. "A common-sense view of the word 'regulates' would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, but be specifically directed toward that industry." (*Pilot Life, supra*, 107 S.Ct. at p. 1554.)

The court next applied the McCarran-Ferguson factors. Regarding the first factor — whether the practice has the effect of spreading policyholder risk — the court determined, without explanation, that unlike the mandated-benefits law in *Metropolitan Life*, the

Mississippi common law did not effect a spreading of policyholder risk. (*Pilot Life, supra*, 107 S.Ct. at p. 1554.) Addressing the second factor — whether the practice is an integral part of the policy relationship between the insurer and the insured — the court stated that the Mississippi common law could perhaps be considered a part of the insurer-insured relationship, but that the connection was attenuated at best. "In contrast to the mandated-benefits law in *Metropolitan Life*, the common law of bad faith does not define the terms of the relationship between the insurer and the insured; it declares only that, whatever terms have been agreed upon in the insurance contract, a breach of that contract may in certain circumstances allow the policyholder to obtain punitive damages." (*Pilot Life, supra*, 107 S.Ct. at p. 1555.) Thus, although the common law could be considered a "part" of the insurer-insured relationship, it could not be considered an "integral" part. (*Ibid.*) Finally, applying the third factor — whether the practice is limited to entities within the insurance industry — the court noted that the common law had general application to all members of the community, and was not directed solely to the insurance industry. (*Ibid.*) The court concluded that the Mississippi common law failed the McCarran-Ferguson test. (*Id.* at pp. 1554-1555.)

The court easily distinguished its *Pilot Life* holding from the holding in *Metropolitan Life*. (*Pilot Life, supra*, 107 S.Ct. at p. 1558.) *Metropolitan Life* did not involve a state law that conflicted with a substantive provision of ERISA, because ERISA — unlike the Massachusetts law in *Metropolitan Life* — "does not regulate the substantive content of welfare-benefit plans." (*Metropolitan Life, supra*, 471 U.S. at p. 732.) However, in *Pilot Life* the common law remedies asserted by Dedeaux conflicted with ERISA's remedies. Therefore, the court in *Pilot Life* went on to determine

whether Congress intended the ERISA remedies to be exclusive.

The Supreme Court concluded that Congress clearly expressed an intent that the civil enforcement provisions of ERISA be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits. (*Pilot Life, supra*, 107 S.Ct. at p. 1555.) The court's determination of exclusivity is supported by the language and structure of ERISA's civil enforcement provisions and by the legislative history of the act.[4] (*Ibid.*) "In sum, the detailed provisions of § 502(a) [of ERISA (29 U.S.C. § 1132)] set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." The court added: "The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive." (*Pilot Life, supra*, 107 S.Ct. at pp. 1556-1557.)

Metropolitan Life and *Pilot Life* provide helpful guidance in this case, but the Supreme Court has not

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[4] The legislative history indicates that Congress intended ERISA to have the same preemptive force as the exclusive remedy provisions of section 301 of the Labor-Management Relations Act (LMRA) (61 Stat. 156, 29 U.S.C. § 185). (*Pilot Life, supra*, 107 S.Ct. at pp. 1555, 1557-1558.) The Supreme Court stated that the powerful pre-emptive force of the LMRA displaced all state actions within its scope. (*Id.* at p. 1557.)

addressed the precise issue posed here. A number of other courts, however, have faced this issue.

Roberson v. Equitable Life Assur. Soc. of U.S. (C.D.Cal. 1987) 661 F.Supp. 416 involved facts almost identical to those at bar. Plaintiff Donald Roberson brought an action in state court against The Equitable Life Assurance Society of the United States (Equitable), alleging that Equitable failed to pay all benefits due under an ERISA-regulated employee benefit plan. Roberson's complaint stated seven common law causes of action. The complaint also stated a single statutory cause of action under section 790.03, subdivision (h), and a single cause of action against his employer, Alpha Microsystems, for ERISA remedies. The defendants removed the case to federal court and moved for summary judgment in light of *Pilot Life*. Roberson conceded that all of his common law claims were preempted by ERISA, but argued that his statutory claim under section 790.03, subdivision (h) was not preempted because section 790.03, subdivision (h) regulates insurance within the meaning of ERISA's saving clause.

The district court applied the analysis set forth in *Metropolitan Life* and *Pilot Life*. The court initially concluded that "common sense" suggested that section 790.03, subdivision (h) regulates insurance. "The most persuasive argument in support of saving the California statute is its obvious connection to regulating insurance. Thus, under the 'common sense' test, it would strain logic to argue that section 790.03(h) is not specifically directed toward the insurance industry." (*Roberson, supra*, 661 F.Supp. at p. 422.)

The court determined, however, that section 790.03, subdivision (h) did not satisfy two of the three McCarran-Ferguson criteria. "First, it would not appear that 790.03(h) has any effect of transferring or spreading policyholder risk. Unlike the Massachusetts

law in *Metropolitan Life*, section 790.03(h) does not purport to regulate the substantive terms or content of insurance policies by mandating benefits. Rather, subsection (h) of section 790.03 primarily is aimed at the procedural aspect of processing and settling claims." (*Roberson, supra*, 661 F.Supp. at p. 422.) Turning to the second McCarran-Ferguson factor, the court stated: "Despite its providing for more specific standards of conduct in processing claims for benefits, section 790.03(h) is not 'integral' to the insurer-insured relationship. Section 790.03(h) does not regulate the terms of the contract itself and hence does not regulate 'the business of insurance' as that term is defined under the McCarran-Ferguson Act." (*Ibid.*) The court determined that section 790.03, subdivision (h) is directed toward the insurance industry, and therefore the third McCarran-Ferguson factor was satisfied. But the court cited authority for the proposition that the satisfaction of only one factor is insufficient. (*Ibid.*, citing *United Food & Commercial Workers v. Pacyga* (9th Cir. 1986) 801 F.2d 1157, 1161.)

Finally, the court in *Roberson* followed *Pilot Life's* holding that ERISA's remedies are exclusive. In *Pilot Life*, "because the civil enforcement provisions of ERISA were intended to provide the exclusive remedies for mishandling of claims, the Mississippi law was in conflict with ERISA and was therefore pre-empted. [¶] The same potential for conflict with ERISA's civil enforcement provisions exists with respect to California Insurance Code Section 790.03(h). . . . Section 790.03(h) . . . provides that either an insured *or* third-party claimant may sue an insurer for engaging in unfair claims settlement practices . . . . Such provisions reach impermissibly beyond the scope of ERISA. *See, e.g. [Massachusetts Mut. Life Ins. Co. v. Russell* (1985) 473 U.S. 134, 145-148] (holding that ERISA does not grant a private right of action for delay in processing benefit claims)." (*Roberson, supra*, 661 F.Supp. at p.

423, original emphasis.) The court concluded: "Thus, even assuming that section 790.03(h) regulates insurance and is therefore within the scope of the saving clause, it must be pre-empted for infringing on the same exclusive civil remedy provisions that were dispositive in *Pilot Life*." (*Roberson, supra*, 661 F.Supp. at p. 424, fn. omitted.)

In *Kanne v. Connecticut General Life Ins. Co.* (9th Cir. 1988) __ F.2d __ (88 Daily Journal D.A.R. 12662), the Ninth Circuit Court of Appeals began where *Roberson* left off: It found the conclusion inescapable that section 790.03, subdivision (h) is preempted under *Pilot Life*. Although the Ninth Circuit stated its general agreement with the *Roberson* opinion (*id.* at p. 12665, fn. 6), it was willing to assume for purposes of its analysis that section "790.03(h) is a law regulating insurance under the savings clause." (*Id.* at p. 12664.)

The *Kanne* court rejected the plaintiffs' argument for limiting *Pilot Life's* preemption holding to only those state laws which do not fall within the savings clause: "To accept this argument, . . . we would have to ignore the second half of *Pilot Life*, 107 S.Ct. 1555-58, in which the Court made abundantly clear that its preemption holding was equally based on its acceptance of the Solicitor General's view that 'Congress clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle for actions asserting improper processing of a claim for benefits.' " (88 Daily Journal D.A.R. at pp. 12664-12665.) The court concluded that it was not possible to read the *Pilot Life* discussion of congressional intent as permitting a state statute like section 790.03, subdivision (h) to supplement the ERISA civil enforcement provisions available to remedy improper claims processing. (*Id.* at

p. 12665.)[5]

Our reading of *Pilot Life* accords with that of the Ninth Circuit in *Kanne*. We are persuaded that section 790.03, subdivision (h) would still be preempted by ERISA even if it were found to be within the scope of the savings clause as a law regulating insurance. This conclusion is compelled by the Supreme Court's discussion of congressional intent, which the court cited as the most significant factor in its determination. (*See Pilot Life Ins. v. Dedeaux, supra*, 107 S.Ct. at p. 1558.)

In *Pilot Life* the Supreme Court held that Congress intended the remedies set forth in ERISA to be the *exclusive* remedies available to ERISA-plan claimants. (*Pilot Life, supra*, 107 S.Ct. at pp. 1555-1557.) However, section 790.03, subdivision (h), as had been

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[5] Other cases have also found preemption. *Lee v. Prudential Ins. Co. of America* (N.D. Cal. 1987) 673 F.Supp. 998 held that although section 790.03, subdivision (h) *does* regulate insurance under the common-sense and McCarran-Ferguson analyses, the statute is nevertheless preempted because ERISA's remedies are exclusive. *Misic v. Building Service Employees Health* (9th Cir. 1986) 789 F.2d 1374 affirmed the dismissal of the plaintiff's state law claims, including a claim under section 790.03, subdivision (h), based on ERISA preemption. *Russell v. Mass. Mut. Life Ins. Co.* (9th Cir. 1983) 722 F.2d 482, reversed on other grounds in *Massachusetts Mut. Life Ins. Co. v. Russell, supra*, 473 U.S. 134, held that the plaintiff's state law claims, including section 790.03, subdivision (h) are preempted by ERISA.

Although some federal courts have determined that section 790.03, subdivision (h) is not preempted by ERISA, those cases were decided prior to *Metropolitan Life* and *Pilot Life* and did not have the benefit of the Supreme Court's guidance on the issue. (*See Eversole v. Metropolitan Life Ins. Co., Inc.* (C.D.Cal. 1980) 500 F.Supp. 1162; *Presti v. Connecticut General Life Ins. Co., Inc.* (N.D.Cal. 1985) 605 F.Supp. 163.)

We are aware that other decisions have been rendered on both sides of the issue presented. Because those decisions are unpublished, they are not discussed here.

interpreted by our decision in *Royal Globe, supra*, 23 Cal.3d 880, provided a private litigant with a cause of action for bad faith settlement practices. (See Part IV, post, p. __' [typed opn. pp. 19-20].) This remedy is not available under ERISA. (*Cf. Massachusetts Mut. Life Ins. Co. v. Russell, supra*, 473 U.S. at pp. 145-148 [private right of action for extracontractual damages is neither expressly nor impliedly available under 29 U.S.C. § 1109, subd. (a)].) Therefore, the remedy available to a private litigant under section 790.03, subdivision (h), conflicts with ERISA's exclusive remedies. This type of conflict was expressly disallowed in *Pilot Life*. (*Pilot Life, supra*, 107 S.Ct. at pp. 1555-1558.) Moreover, in *Pilot Life* the Supreme Court held that Congress's omission of certain remedies was intentional: "The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. 'The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.' " (*Pilot Life, supra*, 107 S.Ct. at p. 1556, quoting *Massachusetts Mut. Life Ins. Co. v. Russell, supra*, 473 U.S. at p. 146, emphasis in original.) We conclude that *Pilot Life's* express holding controls the resolution of this case.[6] *Pilot Life* is directly on point regarding the exclusivity issue, and its conclusion is inescapable.

We find no merit in the argument that if there is any conflict between ERISA remedies and section 790.03,

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[6] In *Pilot Life*, the Supreme Court stated that its analysis regarding the exclusivity of remedies was the most important factor in its determination of preemption. (*Pilot Life, supra*, 107 S.Ct. at p. 1558.)

subdivision (h) remedies, such conflict was created by Congress when it enacted ERISA's preemption clause and saving clause. The argument asserts that the saving clause allows states to regulate insurance and hence to enact conflicting remedies. However, while the saving clause may allow states to enact statutes that regulate the *substantive* terms of insurance policies (*see, Metropolitan Life, supra*, 471 U.S. at pp. 740-744), the clause does not allow states to enact statutes that provide conflicting *procedural remedies* (*see Pilot Life, supra*, 107 S.Ct. at pp. 1555-1558). A contrary rule would undermine ERISA's important policy of promoting uniformity in employee benefit-plan remedies, by creating the potential for conflicting standards of recovery. (*Powell v. Chesapeake & Potomac Telephone Co. of VA.* (4th Cir. 1985) 780 F.2d 419, 422.)

IV

We conclude that ERISA preempts private causes of action under section 790.03, subdivision (h).[7] Of course, our recent decision in *Moradi-Shalal v. Fireman's Fund Ins. Cos., supra*, __ Cal.3d __, prospectively eliminates private causes of action under section 790.03, subdivison (h). Accordingly, our holding of preemption in this case is applicable only to cases which survive *Moradi-Shalal.*

Although our decision in this case prevents Juliano from stating a cause of action for breach of statutory duties under section 790.03, subdivision (h), he nevertheless may amend his complaint to state a claim for ERISA remedies. (*See* 29 U.S.C. § 1132(e)(1) ["State

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[7] We do not decide whether ERISA preempts an action by the Insurance Commissioner to enforce the provisions of the Unfair Practices Act (§ 790 *et seq.*) where such enforcement pertains to a dispute involving an ERISA benefit plan.

courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section"].)

Let a peremptory writ of mandate issue directing the Superior Court of San Diego County to vacate its order denying defendants' motion for judgment on the pleadings as to plaintiff's fifth count for breach of statutory duties under section 790.03, subdivison (h), and to enter a new order consistent with this opinion.

PANELLI, J.

WE CONCUR:

LUCAS, C.J.
ARGUELLES, J.
EAGLESON, J.
KAUFMAN, J.

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COMMERCIAL LIFE INSURANCE COMPANY v. SUPERIOR COURT

S003129

DISSENTING OPINION BY MOSK, J.

I dissent. I strongly disagree not only with the majority's result but also with their reasoning.

I.

With due deference to the United States Supreme Court, I doubt that it gives the bench and bar helpful guidance when it relies on "common sense" as authority for a decision. Nevertheless the High Court has done so in *Pilot Life Ins. Co. v. Dedeaux* (1987) ___ U.S. ___ [107 S.Ct. 1549] and the majority herein hold that conclusion to be controlling.

In *Pilot Life*, the court finds a "broad common-sense meaning" (*id.* at p. 1553), a "common-sense view" (*ibid.*), "a common-sense understanding" (*id.* at p. 1554), a "common-sense view" (*ibid.*) and the opinion concludes with a "common-sense understanding" (*id.* at p. 1558).

In reliance on *Pilot Life*, the majority seem to assume that there is some pandemic "common sense" that can guide us in the place of reason and authority. It would indeed be comforting if that were so. But unfortunately it is not: "common sense" is in the eye, or mind, of the beholder.

United States Supreme Court cases have used the term "common sense" in a wide variety of contexts.

Indeed, a cursory count indicates the expression can be found in more than 500 cases over the past 4 decades alone.

For example, the high court has used "common sense" and "subjective" as synonyms. (*See, e.g., United States v. Maine* (1985) 469 U.S. 504, 525.) In other cases, it has equated "common sense" with probability. (*E.g., Basic Inc. v. Levinson* (1988) __ U.S. __, __ [108 S.Ct. 978, 991].) Justice Cardozo wrote of "common-sense accommodation" in *Gully v. First National Bank* (1936) 299 U.S. 109, 117, and in *Monessen Southwestern Ry. Co. v. Morgan* (1988) __ U.S. __, [108 S.Ct. 1837, 1852], reference is made to "common experience or common sense." *Mills v. Maryland* (1988) __ U.S. __, __ [108 S.Ct. 1860, 1875], discusses "a common-sense core of meaning." *United States v. Providence Journal Co.* (1988) __ U.S. __, __ [108 S.Ct. 1502, 1514], discerns a "common sense reading" of a statute, as does *Boos v. Barry* (1988) __ U.S. __, __ [108 S.Ct. 1157, 1162]. *Honig v. Doe* (1988) __ U.S. __, [108 S.Ct. 592, 604], relies on a "common sense proposition." *Carnegie-Mellon University v. Cohill* (1988) __ U.S. __, __ [108 S.Ct. 614, 622], holds a proposition is "confirmed by common sense," and *United Paperworkers Intern. Union v. MISCO, Inc.* (1987) __ U.S. __, __ [108 S.Ct. 364, 374], concludes a judgment is "firmly rooted in common sense." For the ultimate, the court in *Norwest Bank Worthington v. Ahlers* (1988) __ U.S. __, __ [108 S.Ct. 963, 970], found "great common sense." How we are to distinguish between "common sense" and "great common sense" is perplexing.

As a review of the foregoing cases and others like them establishes beyond any dispute, "common sense" is a convenient term. But it is also practically devoid of content.

For instance, in attempting to justify the holding of the court in *Peak v. United States* (1957) 353 U.S. 43, on behalf of the majority Justice Douglas stated, "That seems to us to be the common sense of the matter; and common sense often makes good law." (*Id.* at p. 46.) But Justice Harlan, writing for himself and two others in dissent, drily observed, "Thus is bad law made." (*Id.* at p. 52 [dis. opn. of Harlan, J.].) Can it be said that by disagreeing with the majority on a point of law Justice Harlan and his colleagues were guilty of not using "common sense"? I think not.

In *Roschen v. Ward* (1929) 279 U.S. 337, 339, Justice Holmes declared, "there is no canon against using common sense in construing laws as saying what they obviously mean." Sounds simple. But as Justice Story noted in *Barlow v. United States* (1833) 7 Pet. (32 U.S.) 404, 411, "There is scarcely any law which does not admit of some ingenious doubt." Are the doubters necessarily declining to use "common sense"? I think not.

In *The Kronprinzessin Cecilie* (1917) 244 U.S. 12, Justice Holmes referred to what is apparently a specialized form of "common sense": "Business contracts must be construed with business sense . . . ." (*Id.* at p. 24.) Apparently that did not satisfy the entire court, for Justices Pitney and Clarke dissented. What kind of sense they preferred was not indicated.

Members of the high court have not been altogether unmindful of the problems associated with "common sense." In *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association* (1982) 457 U.S. 702, one of the parties argued that a "common sense" interpretation of a statute should be applied. Said Chief Justice Burger in dissent, "the 'common sense' meaning of a term is not controlling when Congress has provided . . . an explicit definition of a labor dispute. 'Common sense' and legislative history ought not to change the

meaning of unambiguous words of a statute." (*Id.* at p. 727 [dis. opn. of Burger, C.J.].)

In *In re Primus* (1978) 436 U.S. 412, then Justice Rehnquist wrote in dissent that the majority's " 'common-sense' distinction [between speech proposing a commercial transaction and other varieties of speech] is subject to manipulation by clever practitioners." (*Id.* at p. 441 [dis. opn. of Rehnquist, J.].)

In short, I believe that the implied invocation of "common sense" as authority for an opinion of this court is insufficient and as such cannot be helpful to the parties in this case or to the bench and bar in future matters. As Justice Rehnquist explained, the term is "subject to manipulation" and therefore lacks substance.

II.

Real party in interest Joseph V. Juliano (hereinafter Juliano) brought the underlying action for damages against petitioners Commercial Life Insurance Company and Automatic Data Processing, Inc. (hereinafter collectively Commercial Life). In his complaint Juliano alleged in substance that Commercial Life had issued a policy of insurance, sponsored by his employer, establishing an employee welfare benefit plan that provided group term life insurance, accidental death and dismemberment insurance, and benefits for major medical expenses, prescription drugs and medicines, and dental care; he was entitled to benefits for treatment of diabetic retinopathy and was so informed by Commercial Life; he received treatment including ophthalmic surgery; at first, Commercial Life paid a small portion of his medical bills, but then wrongfully refused to pay the rest. Juliano asserted, among other causes of action, a claim that Commercial Life had violated its statutory duties under the Unfair

Trade Practices Act (Ins. Code, § 790 *et seq.*), specifically, Insurance Code section 790.03, subdivision (h) (hereinafter section 790.03(h)).

The majority hold that the Employee Retirement Income Security Act of 1974 (hereinafter ERISA) (88 Stats. 829, as amended, 29 U.S.C. § 1001 *et seq.*) preempts section 790.03(h) as relevant here and thereby bars Juliano's claim under that provision. As will appear, they are wrong.

ERISA regulates, among other matters, "employee welfare benefit plans" that, "through the purchase of insurance or otherwise," provide "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment . . . ." (ERISA § 3(1), 29 U.S.C. § 1002(1).) Within its sphere, ERISA purports to preempt state law. The act states in a preemption clause that its provisions "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." (ERISA § 514(a), 29 U.S.C. § 1144(a).) ERISA, however, may not and does not preempt state law in its entirety. As relevant here, the act declares in a saving clause that "nothing in this [statute] shall be construed to exempt or relieve any person from any law of any State which regulates insurance . . . ." (ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A).)

It is plain that ERISA regulates the plan in which Juliano participated. As stated above, Juliano's employer sponsored a plan providing a variety of insurance coverage and other benefits for its employees.

It is also plain that section 790.03(h) comes within the class of state laws that ERISA purports to preempt. The provision "relate[s] to . . . employee benefit plan[s]" (ERISA § 514(a), 29 U.S.C. § 1144(a)) be defining "unfair claims settlement practices" (Ins. Code, § 790.03, subd. (h)).

But it is plainer still that section 790.03(h) is saved from preemption by the express terms of ERISA: the provision clearly "regulates insurance" (ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A)). As I read their opinion, the majority do not seriously dispute that section 790.03(h) comes within ERISA's saving clause — nor could they (*see Lee v. Prudential Ins. Co. of America* (N.D.Cal. 1987) 673 F.Supp. 998, 1000-1001).

In spite of the foregoing, the majority hold that section 790.03(h) is not saved from preemption and hence that Juliano's claim under the statutory provision is barred. In support they assert that ERISA has established a civil enforcement scheme that provides exclusive remedies. That may be true. But ERISA's scheme defines remedies *for the violation of rights granted employees under the terms of plans within the coverage of the act and under the act itself.* (*See* ERISA § 502(a), 29 U.S.C. § 1132(a).)[1] By contrast, the

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[1] Section 502(a) of ERISA, codified at 29 United States Code section 1132(a), provides as follows.

"A civil action may be brought —

"(1) by a participant or beneficiary —

"(A) for the relief provided for in subsection (c) of this section [concerning requests to the administrator for information], or

"(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

"(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title [for breach of fiduciary duty];

"(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

"(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title

(continued)

Unfair Trade Practices Act, of which section 790.03(h) is a part, has established a civil enforcement scheme that provides remedies *for the breach of duties imposed on insurers under the laws of the State of California.* In a word, the remedies of ERISA may be exclusive in their own sphere, but they do not extend into the sphere occupied by section 790.03(h). (*Cf. Mackey v. Lanier Collections Agency & Service* (1988) __ U.S. __, __ - __ [108 S.Ct. 2182, 2185-2191] [ERISA does not bar a state garnishment action against a covered empioyee welfare benefit plan: the federal act does not provide an enforcement mechanism for collecting judgments against covered plans and hence does not preempt state law in that area].)

Thus, ERISA does not preempt section 790.03(h), but expressly saves the provision as a law "regulat[ing] insurance." Fur.her, the civil enforcement scheme of the federal statute does not displace the civil enforcement scheme of the state act: the former concerns the rights of employees under covered plans, the latter the duties of insurers under state laws.

III.

There is a growing and ominous trend toward federal preemption of issues that belong within the sphere of control by the individual states. And these inroads into traditional federalism are taking place despite their

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(ftn. continued)
[concerning information to be furnished participants];

"(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

"(6) by the Secretary to collect any civil penalty under subsection (i) of this section [for breach of fiduciary duty]."

inconsistency with pious rhetoric emanating from Washington about returning government to the people at state and local levels.

The first Californian to sit on the United States Supreme Court, Stephen Field, saw the problem clearly as long ago as the period immediately following the Civil War. In *Ex parte Virginia* (1879) 100 U.S. 339, 357, he wrote: "Now, if we look into the Constitution, we shall not find a single word, from its opening to its concluding line, nor in any of the amendments in force before the close of the civil war, nor . . . in those subsequently adopted, which authorizes any interference by Congress with the States in the administration of their governments, and the enforcement of their laws with respect to any matter over which jurisdiction was not surrendered to the United States. The design of its framers was not to destroy the States, but to form a more perfect union between them, and, whilst creating a central government for certain great purposes, to leave to the States in all matters the jurisdiction of which was not surrendered the functions essential to separate and independent existence."

Justice Field took the same position in *Virginia v. Rives* (1879) 100 U.S. 313, 337: "It is difficult to believe that the wise men who sat in the convention which framed the Constitution and advocated its adoption ever contemplated the possibility of a State being required to assert its authority over offenders against its laws in other tribunals than those of its own creation, and least of all in an inferior tribunal of the new government. I do not think I am going too far in asserting that had it been supposed a power so dangerous to the independence of the States, and so calculated to humiliate and degrade them, lurked in any of the provisions of the Constitution, that instrument would never have been adopted."

In the instant case we have a state regulatory statute at issue. In the *Sinking-Fund Cases* (1879) 99 U.S. 700, a state-created corporation was involved. On that subject Justice Field was emphatic: "In a word, the law of the State undertakes to control and manage the corporation, in all particulars required for the service, convenience, and protection of the public; and can there be a doubt in the mind of any one that over its own creations the State has, within its own territory, as against the United States, the superior authority? . . . Under the Constitution the management of local affairs is left chiefly to the States, and it never entered into the conception of its framers that under it the creations of the States could be taken from their control." (*Id.* at pp. 768-769.)

In our case the law regulating insurance was brought .nto existence by the State. Under these circumstances it could not have been contemplated, within constitutional limitations, that enforcement of this state creation should pass exclusively to Washington.

IV.

In conclusion, I would hold that Juliano's section 790.03(h) cause of action is not barred. Accordingly, I dissent.

MOSK, J.

I CONCUR: BROUSSARD, J.

APPENDIX B

January 25, 1989

WINGERT, GREBING, ANELLO & CHAPIN
Attorneys at Law
1750 Bank of America Plaza
450 "B" Street
Sand Diego, CA 92101-8090

Attention: Robert Caietti, Esq.

Re: JOSEPH V. JULIANO vs. AUTOMATIC DATA PROCESSING, INC., etc., et al.
Action No.: 542 103
Our File No.: FB 103

Dear Mr. Caietti:

This letter will confirm the telehpone conversation between us on January 23, 1989. At such time, it was agreed that any and all claims of Joseph V. Juliano arising out of the events or circumstances alleged or referred to in Action No. 542103 or which could be the subject of Action No. 542103 in accordance with the California Supreme Court's decision in this matter, have been fully and finally settled and resolved as against any and all defendants, persons or entities for the total sum of $35,000. It is agreed and understood that each side will bear its own costs. It is further understood and agreed that a dismissal with prejudice of the entire action, will be signed and filed with the court and, further, that a full and final release of any and all claims will be signed by Mr. Juliano.

I will immediatley request that a draft be prepared in the sum of $35,000 and made payable to Joseph V. Juliano and Wingert, Grebing, Anello & Chapin, attorneys at law. Upon receipt of the settlement draft, I will immediately forward it to you along with release and request for dismissal forms to be signed by your office and Mr. Jualiano.

If you could file the request for dismissal with the court, since you are in San Diego, that would be appreciated. However, if you prefer, you can return the signed release and request for dismissal forms to our office. We will then arrange for the filing of the request for dismissal. We will provide your office with a conformed copy.

I would like to thank you for your courtesy throughout our discussions in this matter.

Very truly yours,

HILL, GENSON, EVEN, CRANDALL & WADE
A Professional Corporation

EDMOND D. WADE

EDW/ldl

bcc: First Benefit Services, Inc.
Attn: Myrna Beer

COMMERCIAL LIFE INSURANCE CO.
Attn: Peg Fahey

WINGERT, GREBING, ANELLO & LAVOY
A Partnership Including Professional Corporations
Attorneys At Law
1750 Bank of America Plaza
450 "B" Street
San Diego, California 92101-8090

January 30, 1989

Edmond D. Wade, Esq.
HILL, GENSON, EVAN, CRANDALL & WADE
505 Shatto Place
Los Angeles, CA 90020

Re: Juliano v. ADP
Our File: B-459

Dear Ed:

Pursuant to our conversation on Friday, January 27th, attorney William Shernoff has discussed the matter with Joseph Juliano subsequent to our agreement to settle this matter for $35,000 payable to Joe Juliano in exchange for Mr. Juliano foregoing pursuit of any further appeals in this matter.

Commercial Life's position is that a settlement agreement has been entered into between the parties, and that Commercial Life contends its rights pursuant to that settlement agreement are not effected based on what has transpired to this point.

Understanding that, the file will be sent via United Parcel Service on Monday, January 30th for his review. In talking with Mr. Shernoff he has indicated that he will review the file as expeditiously as possible and provide any recommendations resulting from that review as soon as he can.

Although Mr. Juliano has indicated that he wants us to hold off on the settlement for about a week, realistically

I foresee it being at least two weeks. Please be assured that I will keep you advised of all developments that arise from this point forward until Mr. Shernoff is able to review the file and make the appropriate recommendations as a result thereof.

Should you have any questions or comments, please do not hesitate to contact me. Thank you.

Very truly yours,

WINGERT, GREBING, ANELLO & LaVOY

/s/Robert M. Caietti
Robert M. Caietti

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-5641

THEODORE KANNE AND BEATRIZ KANNE,
Plaintiffs-Appellees,

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF *AMICUS CURIAE* FOR THE UNITED STATES

INTRODUCTION

In *Pilot Life Ins. Co.* v. *Dedeaux*, 107 S.Ct. 1549 (1987), the Supreme Court addressed plaintiff's common law claims of improper handling of his request for disability payments. At the request of the Court, the United States filed a brief *amicus curiae* in which the United States argued that plaintiff's claims were preempted by the Employment Retirement Income Security Act of 1974 (ERISA).[1]

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[1] We are advised that the United States' *amicus curiae* brief from the *Pilot Life* case has been made available to this Court. The position taken in this brief is intended to reaffirm and emphasize the United States' view that ERISA's remedial scheme cannot be lawfully displaced or superseded by inconsistent state laws. See pages 18-19 of the United States' *Pilot Life* brief.

The plaintiffs' claims, in the instant case, would appear, for all practical purposes, to be virtually identical to the claims asserted in *Pilot Life*. Plaintiffs, supported by the *amicus curiae* brief recently filed by the State of California, contend that this case can be distinguished from *Pilot Life* on the ground that the claims here are derived from a statute (as opposed to the common law), and that statute is directed specifically toward the insurance industry (rather than being applicable to insurance companies only incidentally).

In our view, focusing on whether plaintiffs' cause of action derives from statutory or common law makes the problem unnecessarily complicated. The California statute plainly creates a cause of action for improper handling of a claim for benefits under an ERISA-covered plan. Because the Supreme Court held in *Pilot Life* that ERISA's remedial scheme was intended to be comprehensive and of preemptive effect, this Court's June 4, 1987 holding that *Pilot Life* controlled this case was necessarily correct.

ARGUMENT

APPELLEES CLAIMS ARE PREEMPTED BY ERISA

1. In *Pilot Life* the Supreme Court unanimously held that inconsistent state civil remedies for tortious conduct in the processing or handling of benefit claims could "completely undermine[ ]" the "careful balancing" struck in ERISA Section 502(a) (29U.S.C. 1132(a)) between the "need for prompt and fair settlement procedures" and "the public interest in encouraging the formation of employee benefit plans." 107 S. Ct. at 1556.[2] The Court stated:

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[2] The Court, citing *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146 (1985), admonished that ERISA's civil remedies were "carefully integrated"; remedies which were omitted could not be regarded as matters Congress "simply forgot * * *."

> The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion to ERISA's civil enforcement remedies were intended to be exclusive. * * *

Id. at 1556-56.

Thus the Supreme Court found in ERISA's comprehensive enforcement scheme a limitation upon the scope of the insurance saving clause, Section 514(b)(2)(A) (29 U.S.C. 1144(b)(2)(A)). The Court further determined that a state cause of action that seeks remedies for the improper processing of a claim for benefits under an insured plan falls squarely within the same subject matter covered by Section 502(a). *Ibid.* The Court therefore concluded that ERISA's insurance saving clause does not save a state cause of action that is displaced by Section 502(a). *Id.* at 1558.

2. As the Court noted in *Pilot Life*, Congress modeled ERISA's enforcement scheme after Section 301 of the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. 185, which provides an exclusive enforcement procedure for violations of contracts between an employer and a labor organization. The ERISA Conference Committee report explained that under the Act, "civil actions may be brought by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and for relief from breach of fiduciary responsibility," but "[a]ll such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the [LMRA]." H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 327 (1974). As the Court in *Pilot Life* pointed out, this legislative history demonstrates "the clear congressional intention that all suits brought by beneficiaries or participants asserting improper processing of

claims under ERISA-regulated plans be treated as federal questions by §502(a)." *Pilot Life*, 107 S. Ct. at 1557.[3]

3. The Court in *Pilot Life* also concluded that in order to "regulate" insurance, a law must not only have an impact on the insurance industry, but must be specifically directed toward that industry. Because the causes of action in *Pilot Life* involved the application of general contract and tort principles to an insurance contract, and not a law peculiarly applicable to the insurance industry, the Court concluded that the common law did not "regulate insurance" within the meaning of Section 514(b)(2)(A). Plaintiffs and the State of California suggest that because the cause of action in this case derives from a state statute specifically directed toward the insurance industry, *Pilot Life* is not controlling. This is not correct. As explained above, the Supreme Court independently held that because the causes of action in that case sought remedies for the improper processing of a claim for benefits, it was necessary to consider the preemptive effect of ERISA's civil enforcement scheme. The Court's conclusion that ERISA's insurance saving clause does not save a state cause of action that is displaced by Section 502(a) is controlling here. "The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop, indeed the entire comparison of ERISA's § 502(a)

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[3] Congress determined that under Section 502(a) of ERISA, as under Section 301 of the LMRA, "substantive principles of federal labor law must be paramount in the area covered by the statute." *Pilot Life*, 107 S. Ct. at 1557, quoting *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962). The Court did not attempt to define the contours of the federal common law under Section 502; rather, the Court acknowledged Congress' intent that " 'a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.' " *Id.* at 1557-1558, quoting 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits). Because plaintiffs-appellees do not assert an ERISA cause of action, there is no occasion for this Court to consider the scope of the federal common law in this case.

to § 301 of the LMRA, would make little sense if . . . [ERISA's enforcement scheme] could be supplemented or supplanted by varying state laws." 107 S. Ct. at 1558.

CONCLUSION

The decision of the panel filed June 4, 1987, should be reinstated.

Respectfully submitted,

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Assistant Attorney General

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No. 88-1530

Supreme Court, U.S.
FILED
APR 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

JOSEPH V. JULIANO,

Petitioner,

vs.

COMMERCIAL LIFE INSURANCE COMPANY and AUTOMATIC DATA PROCESSING, INC.

Respondents.

On Petition For Writ Of Certiorari To The California Supreme Court

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

ARGUMENT 6

I. THE SOLICITOR GENERAL'S ASSESSMENT OF ERISA § 502(a), ADOPTED BY THIS COURT IN *PILOT LIFE*, IS ANALYTICALLY FLAWED IN THE CONTEXT OF A STATE LAW ENCOMPASSED BY THE SAVING CLAUSE AND, IN FACT, CONTRAVENES EXPRESS CONGRESSIONAL DIRECTIVES ... 6

II. THE SOLICITOR GENERAL'S ARGUMENT FAILED TO ADDRESS CONGRESS' EVIDENT PURPOSE AT CREATING A DUAL SYSTEM OF FEDERAL AND STATE REGULATION OF THE BUSINESS OF INSURANCE 8

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

California Federal Savings & Loan Assn. v. Guerra, 479 U.S. 272 (1987) 15

Caminetti v. United States, 242 U.S. 470 (1917) 9

Commercial Life Ins. Co. v. Superior Court, 47 Cal.3d 473 (1988) 2, 3, 15

DeCanis v. Bica, 424 U.S. 351 (1976) 6

Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1978) 3

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 6

Metropolitan life Ins. Co. v. Massachusetts, 471 U.S. 724 (1984) 4, 5, 8

Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) 5, 8

Moradi-Shalal v. Fireman's Fund Ins. Co., 46 Cal.3d 287 (1988) 1

Northwest Central Pipeline Corp. v. State Corporation Commissioner of Kansas, ___ U.S. ___, 57 U.S.L.W. 4302 (1989)(No. 86-1856). 9

Pilot Life Ins. v. Dedeaux, 481 U.S. 41 (1987) ..... *passim*

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 6

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 6

Royal Globe Ins. Co. v. Superior Court, 23 Cal.3d 880 (1979) 1

TABLE OF AUTHORITIES–Continued

Page

Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1981) 4

Western & Southern Life Ins. Co. v. State Board of Equalization, 451 U.S. 648 (1981) 5, 8

STATUTES

California Civil Code

§ 51 2

§ 52 2

California Insurance Code

§ 790 1

§ 790.03 ..... 3, 12

§ 1861.03 2

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*

§ 502(a) ..... *passim*

29 U.S.C. § 1001(a) 1, 12

29 U.S.C. § 1132(a) 2

29 U.S.C. § 1144(b)(2)(A) ..... *passim*

29 U.S.C. § 1144(b)(2)(B) 10

29 U.S.C. § 1144(b)(5) 14

29 U.S.C. § 1144(b)(6)(A) 10, 13, 14

29 U.S.C. § 1144(b)(6)(B) 13

TABLE OF AUTHORITIES–Continued

Page

Federal Trade Commission Act, 15 U.S.C. § 46(h) 12

McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*

15 U.S.C. § 1011 ..... 1, 6, 8

15 U.S.C. § 1012 ..... 1, 6

Pub.L. No. 97-473, § 302(b) (Jan. 14, 1983) 96 Stats. 2613 10

OTHER AUTHORITIES

1980 U.S.Code Cong.Admin.News 12

ANNOTATION, *Validity, Construction, and Application of McCarran-Ferguson Act (15 USC §§ 1011-1015), Dealing With Regulation of Insurance Business By State or Federal Law* 21 L.Ed.2d 938, 948-951 (1969) 1

Brief for the United States as Amicus Curiae Pilot Life, 481 U.S. 41 (1987)(No. 85-1043) ..... *passim*

Remarks of Representative Burton 128 Cong.Rec. H9609 (Dec. 13, 1982) 10, 11, 12

Remarks of Representative Erlenborn 128 Cong.Rec. H9610 (Dec. 13, 1982) 10, 11

Remarks of Representative Erlenborn 128 Cong.Rec. H9611 (Dec. 13, 1982) 11

Remarks of Senator Durkin 126 Cong.Rec. 2376 (1980) 13

Remarks of Senator Metzenbaum 126 Cong.Rec. 2374 (1980) 13

INTEREST OF AMICUS CURIAE

Pursuant to Sup.Ct.R. 36.4, the State of California, by its Attorney General, respectfully submits this brief as *amicus curiae* in support of the Petition for Certiorari filed by Joseph V. Juliano. The State of California appears for the purpose of protecting the scope of its authority, expressly recognized by Congress, to regulate the business of insurance without impairment by the Employee Retirement Income Security Act (ERISA).[1] 29 U.S.C. § 1144(b)(2)(A); see also, 15 U.S.C. §§ 1011, 1012; ANNOTATION, *Validity, Construction, and Application of McCarran-Ferguson Act (15 USC §§ 1011-1015), Dealing With Regulation of Insurance Business By State or Federal Law*, 21 L.Ed.2d 938, 948-951 (1969).

The State of California is interested in the instant petition because the state's supreme court has read this Court's decision in *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41 (1987), necessarily, if only impliedly, to decree that a civil action for damages, brought pursuant to a California statute which regulates the business of insurance,[2] is

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[1] 29 U.S.C. § 1001 *et seq.*

[2] The civil action for damages is authorized by Cal. Ins. Code, § 790, California's Unfair Practices Act, as construed by the California Supreme Court in *Royal Globe Ins. Co. v. Superior Court*, 23 Cal.3d 880 (1979). That construction of the Unfair Practices Act has been overturned in a decision having a prospective effect only and, therefore, leaving Petitioner Juliano's civil action intact as a matter of state law. See *Moradi-Shalal v. Fireman's Fund Ins. Co.*, 46 Cal.3d 287 (1988). Since *Moradi-Shalal*, legislation has been introduced to include in the Unfair Practices Act a specific statutory authorization for

(Continued on following page)

preempted by ERISA's civil enforcement provisions, ERISA § 502(a); 29 U.S.C. § 1132(a). *Commercial Life Ins. Co. v. Superior Court*, 47 Cal.3d 473 (1988).

In *Pilot Life, supra*, this Court considered the question whether Mississippi's common law, as applied to the business of insurance, was exempted from preemption under ERISA by the "saving clause," 29 U.S.C. § 1144(b)(2)(A). The Court first determined that, because state common law could not reasonably be considered a "law which regulates insurance," the mere fact that common law was incidentally applied to the business of insurance would not save it from preemption. *Pilot Life*, 481 U.S. at 51-57. The Court could have ended its discussion at that point, but did not.

At the evident urging of the Solicitor General,[3] the Court proceeded to consider a second, distinct basis for

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enforcement by civil action for damages. See SB 1329 (Marks), a copy of which is appended hereto. The legislative process, however, is encumbered by the prospect of federal preemption left by the state supreme court's reading of *Pilot Life*. Amicus is concerned, as well, because the state supreme court's reading of *Pilot Life* has implications for other state laws which regulate the business of insurance. For example, Cal. Ins. Code, § 1861.03, adopted by California voters in November 1988, expressly makes California's Unruh Civil Rights Act, Cal. Civ. Code, § 51, applicable to the business of insurance. Violations of the Unruh Civil Rights Act are remediable by, *inter alia*, civil action for damages or action by the Attorney General for injunctive relief. Cal. Civ. Code, § 52.

[3] See *Brief for the United States as Amicus Curiae, Pilot Life, supra*, 481 U.S. 41 (No. 85-1043) (hereafter, *Pilot Life Brief for the United States)*, at 16, n. 13, 18-19.

finding ERISA preemption of the state damage action. That finding of preemption was grounded on the Solicitor General's contention that ERISA § 502(a) could be construed independently to exclude any and all remedies not afforded by ERISA itself. *Pilot Life*, 481 U.S. at 51-57.

The Court's § 502(a) analysis was not necessary to disposition of *Pilot Life*. It was urged upon the Court by the Solicitor General only to forestall certain "line drawing" difficulties he anticipated should the Court adopt his contention that ERISA's saving clause encompasses only state laws specifically regulating the business of insurance. *Pilot Life Brief for the United States*, at 15-16.

But, this analysis did not concern a state law claim for damages which *does*, at least arguably, come within ERISA's saving clause.[4] And, with respect to such a state

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[4] The California Supreme Court did not expressly decide the question whether Cal. Ins. Code, § 790.03 was a "law which regulates insurance," within the meaning of the saving clause, although the proposition was not seriously disputed. *Commercial Life*, 47 Cal.3d at 488 (Mosk, J., dissenting.) Amicus respectfully notes, however, that this Court's suggestion that certain "McCarran-Ferguson Act factors," see *Pilot Life*, 481 U.S. at 48-51, may define the outer limits of a "law which regulates insurance" poses significant analytical difficulties. To begin with, those factors were devised for the purpose of giving only the most quintessential definition to the phrase "business of insurance," in order to secure the broadest congressional authority to regulate anti-trust matters under § 2(b) – the Act's "secondary purpose". See *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 218, n. 18 (responding to 440 U.S. at 233-256 (Brennan, J., dissenting)), and 220 (1978). The criteria were never intended to be dispositive of the Act's

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law claim, the § 502(a) analysis is fundamentally flawed, for the plain language of the saving clause itself expressly prohibits the very analysis in which the Court indulged. This methodological barrier was not addressed by the Solicitor General in his brief.

Despite the fact that the Court's § 502(a) analysis can only logically be applied in a case where a state law claim is not even arguably preserved from preemption by the

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primary purpose under §§ 2(a) and 2(b) of the Act, viz., preservation of state authority to regulate the business of insurance, see *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 134-140 (1981) (Rehnquist, J., dissenting). Furthermore, with all respect, the Solicitor General's application of the McCarran-Ferguson Act factors, *Pilot Life Brief for the United States*, at 17-18, accepted by this Court, *Pilot Life*, 481 U.S. at 50-51, goes beyond the Court's analysis in *Metropolitan Life Ins. Co. v. Massachusetts*, and has no logical foundation. In *Metropolitan Life Ins.*, the Court looked to the McCarran-Ferguson Act factors as guidance for assessing whether the *practices* sought to be regulated by the mandated-benefit law constituted the business of insurance. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 743-745 (1985). In *Pilot Life*, however, the Solicitor General urged the Court to apply the factors, not to the *practices* sought to be regulated, but rather to the *regulation* itself, i.e., in that case, to Mississippi's common law of bad faith; the Court did so. 481 U.S. at 50-51. Such an analysis, however, literally equates the *regulation* of insurance with the *business* of insurance, and suggests that Congress intended to encompass within the insurance clause only state laws which themselves accomplish the purposes and practices of the insurance industry they regulate. Amicus respectfully submits that it is aware of no authority to support such a proposition, and that the Court's analysis in *Pilot Life* threatens to circumscribe state regulatory authority in a manner never intended by Congress.

saving clause itself, so sweeping was the Court's language in *Pilot Life* on this point that Amicus cannot simply assert that the state supreme court misread this Court's decision. The State of California respectfully requests that this Court grant certiorari to consider whether the *Pilot Life* analysis *can*, in fact, be applied in a case where a damage claim arises out of a state law specifically regulating the business of insurance.

ARGUMENT

I

THE SOLICITOR GENERAL'S ASSESSMENT OF ERISA § 502(a), ADOPTED BY THIS COURT IN *PILOT LIFE*, IS ANALYTICALLY FLAWED IN THE CONTEXT OF A STATE LAW ENCOMPASSED BY THE SAVING CLAUSE AND, IN FACT, CONTRAVENES EXPRESS CONGRESSIONAL DIRECTIVES

The Solicitor General asserted that Congress may be presumed to have intended that ERISA § 502(a) preempt compensatory remedies, not because Congress expressly so stated, but because Congress arguably would have made reference to such state remedies in a committee report discussing § 502(a) had it intended to exempt them from preemption. *Pilot Life Brief for the United States*, at 19. The Court essentially accepted this argument. *Pilot Life*, 481 U.S. at 55-56.

This Court has long been reluctant to infer preemption in the absence of evidence that this was the clear and manifest purpose of Congress. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *DeCanis v. Bica*, 424 U.S. 351 (1976); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978). Furthermore, in the McCarran-Ferguson Act,[5] Congress has expressly prohibited the courts from invalidating state insurance laws on grounds of federal preemption, except upon affirmative and unambiguous evidence of Congressional intent to preempt such laws. 15 U.S.C. §§ 1011, 1012(b).

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[5] 15 U.S.C. § 1011 *et seq.*

The analysis offered by the Solicitor General in *Pilot Life* was predicated upon negative-implication drawn from meager legislative history. Reliance upon such an analysis for purposes of invalidating a state law which, unlike Mississippi's common law, does come within the insurance saving clause, violates the spirit, if not the letter, of the McCarran-Ferguson Act.

Furthermore, reliance upon such an argument contravenes the plain language of the saving clause itself. That clause unequivocally states that "[N]othing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance. . . ." 29 U.S.C. § 1144(b)(2)(A). Subchapter I includes § 502. Accordingly, if a state law falls within the saving clause, Congress has expressly prohibited reliance on ERISA's substantive provisions as a justification for relieving any person from that law. Extension of the Solicitor General's methodology to the instant case thus has this Court construing § 502(a) to relieve or exempt a person from a state law which regulates insurance – a construction in utter conflict with express congressional directive.

Because, unlike *Pilot Life*, this case involves, at least arguably, a state law which regulates insurance, the explicit and unequivocal statements of Congress in both the McCarran-Ferguson Act and the saving clause itself raise serious questions whether the Solicitor General's methodology is applicable, in view of the constitutional doctrine of separation of powers. Amicus respectfully requests, therefore, that certiorari be granted.

II

THE SOLICITOR GENERAL'S ARGUMENT FAILED TO ADDRESS CONGRESS' EVIDENT PURPOSE AT CREATING A DUAL SYSTEM OF FEDERAL AND STATE REGULATION OF THE BUSINESS OF INSURANCE

There can be little doubt that regulation of the business of insurance is an area long left to the several States by Congress, in recognition of the role played by such regulation in securing the well-being of citizens. See 15 U.S.C. § 1011; see *Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 652-654 (1981); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 888-893 (1985)(O'Connor, J., dissenting). There can also be little doubt that Congress intended to leave at least some measure of state insurance regulation undisturbed. 29 U.S.C. § 1144(b)(2)(A); see *Metropolitan Life Ins. Co. v. Massachusetts, supra*, 471 U.S. 724, 744, n. 21, 745, n. 23.[6]

---

[6] It has been argued that permitting insurers to be subject to varying regulation by the several States defeats Congress' purpose of achieving national uniformity. But such an argument ignores the fact that ERISA's preemption clause was developed *around* the insurance saving clause, indicating that Congress all along intended to preserve to the States the power to regulate the business of insurance. See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 744-745 (1984). The argument also ignores the congressional purpose behind the McCarran-Ferguson Act which, as the language of the saving clause quite clearly indicates, Congress intended to further, rather than limit. Congress has expressly declared that regulation of the business of insurance by the several States is in the public interest. 15 U.S.C. § 1011. That interest is certainly no less

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Nevertheless, the Solicitor General's argument in *Pilot Life*, posits an "absolutist" model, wherein Congress has wholly occupied the field of available remedies to the exclusion of all other remedies. But the statute itself, and related legislative history, indicates that Congress was more precise than the Solicitor General would suggest, and that Congress, in fact, intended to provide a comprehensive and, in some cases, overlapping, system of Federal-State regulation to the end of protecting employees and their beneficiaries. Such a scheme requires careful attention to the lines Congress has actually drawn, rather than to lines which may be analytically preferable. Cf. *Northwest Central Pipeline Corp. v. State Corporation Commissioner of Kansas*, ___ U.S. ___, 57 U.S.L.W. 4302 (1989)(No. 86-1856).

It is a rule of long standing that "the meaning of the statute must, in the first instance, be sought in the language in which the Act is found, and if that is plain, . . . the sole function of the court is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). In this regard, the language actually used by Congress in the saving clause itself is very significant: "[N]othing in this subchapter shall be construed to exempt or relieve any person from any law of any State

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compelling than is the purpose of achieving national uniformity in *other* areas of ERISA's application. Finally, the argument ignores the very obvious fact that Congress must certainly have *anticipated* and assented to varying state regulation as pertains to insurance, else the insurance saving clause has no purpose whatsoever.

which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A).

This is not "all-or-nothing" language; it is language to the effect that, whatever obligations may be imposed by ERISA's substantive provisions, those obligations may not be construed "to exempt or relieve" persons from state insurance, banking, and securities laws. This dual system of regulation, however, does not apply to employee benefit plans themselves, by virtue of the "deemer clause", 29 U.S.C. § 1144(b)(2)(B).

This latter *proviso*, however, is itself qualified, where the employee benefit plan is a multiple employer welfare arrangement or trust (MET), with respect to which state laws which regulate insurance may apply *directly*, as specified. 29 U.S.C. § 1144(b)(6)(A). The provisions relating to MET's are instructive in several respects. They were added to ERISA in 1983[7] in order to correct abuses resulting from under-funded MET's. See Remarks of Representative Burton, 128 Cong.Rec. H9609 (Dec. 13, 1982); Remarks of Representative Erlenborn, 128 Cong.Rec. H9610 (Dec. 13, 1982).[8] These MET's were avoiding regulation under state insurance laws by raising the shield of

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[7] Pub.L. No. 97-473, § 302(b) (Jan. 14, 1983), 96 Stats. 2613.

[8] Representative Erlenborn observed: "Generally, the abuses connected with the MET's can be and, in some cases, have been dealt with under appropriate state laws. Unfortunately, the MET operators have been successful in thwarting timely investigations and other enforcement activities of state agencies by asserting that such entities are ERISA 'plans' for which all state regulation is preempted pursuant to section 514 of the Employee Retirement Income Security Act of 1974

(Continued on following page)

preemption under ERISA as employee benefit plans, However, Congress was concerned that ERISA's administrative mechanisms were inadequate to afford sufficient protection against the abuses.[9]

Congress was aware that, under existing law, state insurance laws are applicable to insurance companies which provide funding for the MET's, see Remarks of Representative Erlenborn, 128 Cong.Rec. H9611 (Dec. 13,

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(ERISA). In all too many cases, the result has been that state remedial actions have come too late to head off insolvency and benefit losses stemming from mismanagement and misdeeds of the MET operators. This has proved to be the general rule in spite of steps taken by the Department of Labor to clarify the jurisdictional role of the States in regulating MET's. In fact, the ERISA Administrator in the Department of Labor has testified that in virtually all of the cases in which the Department has issued an opinion as to coverage of a MET entity under ERISA, the entity in question has been found not to qualify as an employee welfare benefit plan with respect to which the ERISA preemption provision applies. The proposed legislation closes off all avenues of opportunity that might currently exist for MET operators to avoid such regulation at the Federal and State level as may be applicable in each particular circumstance." 129 Cong.Rec. H9610 (Dec. 13, 1982).

[9] Representative Burton observed: "By the time the U.S. Department of Labor decides if Federal law applies, the individuals who established the bogus insurance ventures have long since departed with the money and workers are left without any means of covering unpaid medical bills." 128 Cong.Rec. H9609 (Dec. 13, 1982).

1982),[10] but Congress wanted to ensure that state insurance laws would be applicable directly to the MET's themselves, even at the risk of some resulting disuniformity in that regulation.[11]

The 1983 amendments demonstrate that state regulation of insurance practices is not merely *incidental* to Congress' purposes behind ERISA, but is *integral* to those purposes. By permitting states to continue to regulate benefit plans *indirectly*, through their insurance, banking, and securities laws, Congress created a comprehensive scheme for protecting employees and their beneficiaries as respects benefit plans.[12] Significantly, Congress did not

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[10] "[I]t is clear even under present law that state law may apply to funding vehicles for plans; for example, state insurance laws obviously apply to licensed insurance companies which underwrite benefits in a number of individual employer or union established benefit plans."

[11] The 1983 amendments confirm that Congress' principal concern in ERISA is the protection of employee benefit plans and the provision of *minimum* standards for assuring the equitable character of such plans and their financial soundness. 29 U.S.C. § 1001(a); see Remarks of Representative Burton, 128 Cong.Rec. H9609 (Dec. 13, 1982) ("Although the Employee Retirement Income Security Act of 1974 (ERISA) was enacted to protect workers, some individuals have used ERISA as a smoke screen to conceal fraudulent activities"). Congressional concern with national uniformity is obviously intended to *further* its primary purpose, not *thwart* it.

[12] Furthermore, legislative history surrounding 1980 amendments to the Federal Trade Commission Act, 15 U.S.C. § 46(h), indicates Congress' recognition – and endorsement – of state laws, such as Cal. Ins. Code § 790.03, as valid and valuable measures for regulating insurance industry practices. See House Conf. Rpt., 1980 U.S.Code Cong.Admin.News at p.

(Continued on following page)

alter that scheme, in addressing the problem of MET's, by increasing *federal* regulation of those arrangements; rather, Congress recognized that the *States* could provide the necessary protections and, accordingly, extended *state* insurance regulation to cover MET's directly.[13]

Perhaps most significant, however, is the fact that the 1983 amendments mark the first instance where Congress has *qualified* permissible state insurance regulation by either specifying acceptable areas of regulation (as in the case of subdivision (b)(6)(A)(i)) or by requiring such regulation to be "consistent" with the substantive provisions of ERISA (as in the case of subdivision (b)(6)(A)(ii)). The significance lies in the fact that Congress has chosen to supervise state insurance regulation only where such regulation would be applied *directly* to an employee benefit plan.

(Continued from previous page)

1144; see also, Remarks of Senator Metzenbaum, 126 Cong.Rec. 2374 (1980); Remarks of Senator Durkin, 126 Cong.Rec. 2376 (1980).

[13] In the case of a MET which is an employee welfare benefit plan that is not fully insured, Congress has expressly permitted States to regulate *all* insurance aspects of the MET, not merely funding levels, to the extent that such state regulation is not inconsistent with the substantive provisions of ERISA. 29 U.S.C. § 1144(b)(6)(A)(ii). The Secretary of Labor may exempt a MET from such total state regulation, only if the MET would qualify as an employee benefit plan under ERISA. 29 U.S.C. § 1144(b)(6)(B). But, in the case of such exemption, the employee benefit plan would, nevertheless, be subject to state insurance laws regulating funding levels. 29 U.S.C. § 1144(b)(6)(A)(i).

No similar qualification for consistency with ERISA is found in the saving clause, which permits application of state insurance laws *indirectly* against employee benefit plans, by permitting direct regulation of the *insurers* of such plans. Moreover, if Congress believed that, apart from the preemption clause, ERISA's substantive provisions would, *independently*, permit only consistent state regulation of insurance in any event, it would have been unnecessary for Congress to have insisted on consistency in relation to insurance regulation of MET'S altogether. Indeed, the fact that Congress insisted on "consistency" with respect to *direct* state regulation of employee benefit plans strongly suggests that Congress understood fully that even *inconsistent* state insurance laws are applicable to insurance companies which *fund* such employee benefit plans.

Despite its lack of simple elegance, ERISA itself articulates the areas wherein, and in what respects, Congress has sought to exclude regulation of insurance by the several States. Congress knows how to allow only "consistent" regulation by the several States, when Congress *wants* to permit only consistent regulation by the States. 29 U.S.C. § 1144(b)(6)(A)(ii). Congress also knows how to carve out of otherwise preempted fields, areas wherein a State may regulate. 29 U.S.C. § 1144(b)(6)(A)(i); see also 29 U.S.C. § 1144(b)(5). And, Congress' reservation of authority to the several States to affect employee benefit plans *indirectly* by regulating insurers is *unqualified*, in language which could hardly be more unequivocal. 29 U.S.C. § 1144(b)(2)(A). There is, therefore, no need to go beyond the statute itself to discern whether Congress might have intended some other qualification on state

authority to regulate insurers. Cf., *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 280-284, and 295-296 (1987) (Scalia, J., concurring).

If *Pilot Life's* discussion of ERISA § 502(a) is allowed to be extended, unscrutinized, to invalidate a state law applied specifically to the insurance industry, the Solicitor General will have been able, in a single stroke, unilaterally to replace the *actual* and deliberately crafted policy of Congress, as reflected by Congress' own words, with a policy that is flatly contradictory, if analytically preferable. The Court is respectfully requested to permit more thorough development and analysis of Congress' intent respecting state regulation of insurance by granting the instant petition for certiorari.

CONCLUSION

The Federal-State tensions created by ERISA's preemption and saving clauses are obviously of great and continuing concern to the several States, implicating the very delicate and central fabric of federalism upon which the Constitution is based. See, *Commercial Life Ins. Co. v. Superior Court, supra*, 47 Cal.3d at 490-491 (Mosk, J., dissenting). This is particularly true where, as here, congressional efforts to preserve historic and emotion-laden arrangements between Congress and the several States concerning the regulation of the business of insurance appear to have been swept aside for purposes of analytical convenience.

If a traditional area of state regulation is to be preempted by a federal enactment, Congress must clearly

evince its intent to do so; this Court has never accepted a lesser standard. Yet this Court's own decision in *Pilot Life* is being read, not unreasonably, to decree that state laws regulating insurance must be declared preempted, based, not on any clear indication of congressional intent to do so, but rather – and despite persuasive evidence of an apparent congressional intent *not* to do so – based on speculative and tenuous negative implications drawn from scant legislative history.

The State of California respectfully and urgently requests that the Court grant the Petition for Certiorari herein so that substantial but unaddressed issues of state authority may be more fully and completely developed than they were in *Pilot Life*.

DATED: April 14, 1989

Respectfully submitted,

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APPENDIX

SENATE BILL No. 1329

Introduced by Senators Marks and Rosenthal
(Coauthor: Assembly Member Connelly)

March 9, 1989

An act to add Section 790.031 to the Insurance Code, relating to Insurance.

LEGISLATIVE COUNSEL'S DIGEST

SB 1329, as introduced, Marks. Insurance: good faith.

Existing law prohibits certain unfair and deceptive practices in the business of insurance. However, under existing law, a violation of those statutory provisions does not, in itself, give rise to a private cause of action against an insurer.

This bill would provide that any person engaged in the business of insurance is required to act in good faith toward, and to deal fairly with, policyholders and others, as specified. The bill would provide that a policyholder or other person may bring an action against an insurer or other licensee of the Department of Insurance for a violation of that requirement and other statutory provisions that prohibit unfair and deceptive practices, and may recover compensatory and exemplary damages.

Vote: majority. Appropriation: no. Fiscal committee: No. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 790.031 is added to the Insurance Code, to read:

790.031. Any person engaged in the business of insurance in the State of California is required to act in good faith toward, and to deal fairly with, current and prospective policyholders and other persons intended to be protected by any policy of insurance. A policyholder or a third party may bring an action against an insurer or licensee for violation of the provisions of this article, including, but not limited to, subdivision (h) of Section 790.03.

In accordance with the Unruh Civil Rights Act, Section 51 of the Civil Code, an insurer shall not arbitrarily discriminate against individuals in the denial of insurance coverage.

The purpose of this article is to regulate unfair insurance practices, including unfair claims practices, by providing state-court remedies, including compensatory and exemplary damages, to policyholders and claimants who are victims of unfair insurance practices. It is specifically intended that these remedies be construed to regulate the business of insurance regardless of whether the policy was purchased individually or as a member of a group, and regardless of whether or not the policy was purchased or provided by or through an employer, and thereby to provide that state-law remedies are available notwithstanding the provisions of the Employee Retirement and Income Security Act, 29 U.S.C. Section 1001 et seq.

Any award of punitive damages against an insurer shall not be passed on to policyholders directly or indirectly.

MOTION FILED
APR 14

No. 88-1530

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

JOSEPH V. JULIANO,
Petitioner,
vs.
COMMERCIAL LIFE INSURANCE COMPANY
and AUTOMATIC DATA PROCESSING, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

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AMICUS CURIAE AND BRIEF AMICUS CURIAE

CALIFORNIA MEDICAL ASSOCIATION

hereby respectfully moves for leave to file the attached Brief Amicus Curiae in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the CALIFORNIA MEDICAL ASSOCIATION in this case arises from the fact that ERISA preemption of state law remedies for the failure of an

insurance company to pay a medical claim may have a negative effect on the welfare of this association's patients and may substantially increase the cost of medical care in California. Since neither petitioner nor respondent can adequately assess the effect of ERISA preemption of state law remedies under the California Insurance Code as it will affect health care and cost in California, it is believed that the Brief which Amicus Curiae is requesting permission to file will present a more complete argument on these issues.

April 14, 1989

Respectfully submitted,

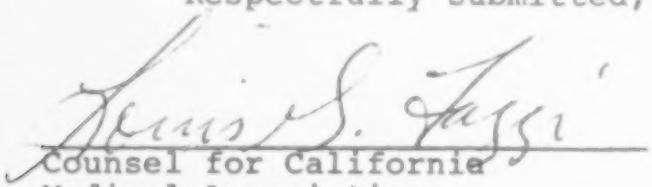

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TABLE OF CONTENTS

Page

INTRODUCTORY STATEMENT 1

I. IT WAS NOT THE INTENTION OF CONGRESS TO DESTROY THE SAFEGUARDS AND PROTECTIONS AFFORDED BY STATE LAW FOR THE BENEFIT OF THE VERY PERSONS CONGRESS INTENDED TO PROTECT BY ENACTING ERISA. 4

A. ERISA preemption would allow insurers to disregard and ignore important legislation enacted by this State for the welfare of the sick and disabled. Preemption will burden the health care system and cause the public to lose protection vital to necessary health care. .4

B. Congress had no intention whatever of permitting the evils that would occur from ERISA preemption of state laws which afford urgently needed insurance protection to employees of ERISA welfare benefit plans. 19

Page

II. THE UNITED STATES SUPREME COURT DECISIONS DO NOT REQUIRE AN INTERPRETATION OF ERISA PREEMPTION THAT WOULD RESULT IN A WHOLESALE NULLIFICATION OF ALL OF THE LAWS OF THIS STATE PROTECTING BENEFICIARIES OF HEALTH CARE INSURANCE. 23

III. INSURANCE CODE SECTION 790.03(h) IS CLEARLY A STATE LAW REGULATING INSURANCE, AND AS SUCH IS EXEMPT FROM ERISA. 27

CONCLUSION 32

TABLE OF AUTHORITIES

Page

Cases

Addrisi v. Equitable Life Assur.
Society of U.S.
(9th Cir. 1974) 503 F.2d 725,
cert. den. (1975) 420 U.S. 929,
95 S.Ct. 1129, rehearing den.
(1975) 421 U.S. 922,
95 S.Ct. 1590.....29

Dill v. Claims Administration
Services, Inc.
178 Cal.App.3d 1184 (1986).....30

Federal Trade Commission v.
National Cas. Co.
357 U.S. 560,
78 S.Ct. 1260 (1958).....29

Kanne v. Connecticut General
Life Ins. Co.
Nos. 85-5641 and 85-5642
(9th Cir. 1987); 607 F.Supp. 899
(C.D. Cal. 1985).....6

Metropolitan Life Ins. Co. v.
Massachusetts
471 U.S. 724,
105 S.Ct. 2380 (1985).....17,
18, 19, 23, 25, 26, 28

Page

Pilot Life Ins. Co. v. Dedeaux
481 U.S. 41,
107 S.Ct. 1549 (1987).....7,
19, 25, 26, 29, 30, 31

Richardson v. GAB Business
Services, Inc.
161 Cal.App.3d 519 (1984).....31

St. Paul Fire & Marine Ins.
Co. v. Barry
438 U.S. 531,
98 S.Ct. 2923 (1978).....29

Wolfrich v. United Services
Automobile Ass'n.
149 Cal.App.3d 1206 (1983).....30

Federal Statutes

United States Code
15 U.S.C. §§ 1011, et seq. 27
15 U.S.C. §§ 1011-1014.....28
29 U.S.C. § 1001.....20
29 U.S.C. §§ 1001, et seq. 2
29 U.S.C. § 1001, subdivision (a)..22,
23
29 U.S.C. § 1001, subdivision (c)...22
29 U.S.C. § 1001a.....22
29 U.S.C. § 1001a,
subdivision (a)(3).....22

29 U.S.C. § 1001b.....22
29 U.S.C. § 1001b,
subdivision (a((2).....22

29 U.S.C. § 1002,
subdivisions 1 through 3..... 5

Page

29 U.S.C. § 1003(a)..... 5
29 U.S.C. § 1003(b)..... 5
29 U.S.C. § 1132.....4, 8
29 U.S.C. § 1132(a)(1)(B)..... 5
29 U.S.C. § 1132(g)..... 6
29 U.S.C. § 1144(b)(2)(A).....24, 27

Code of Federal Regulations
29 C.F.R. § 2560.503-1.....8
29 C.F.R. § 2560.503-1(e)(1)(3).....7
29 C.F.R. § 2560.503-1(h).....7

State Statutes

California Health and Safety Code
§ 1367.4.....11
§ 1367.5.....15
§ 1367.9.....15
§ 1367.10.....12
§ 1368.....12
§ 1369.....12
§ 1370.....13
§ 1371.....17
§ 1373.....14, 16
§ 1373(f).....10
§ 1373(h).....15
§ 1373.4.....10, 14
§ 1374.10.....15
§ 1373.14.....11
§ 1374.....10
§ 1374.7.....11
§ 1375.1.....10
§ 1399.62.....16

California Insurance Code
Article 6.5.....27, 28, 29, 30
§ 790.....30
§§ 790, et seq. 27
§ 790.01.....30
§ 790.02.....30

Page

§ 790.03(a).....29
§ 790.03(h).....3, 7, 27, 28, 31
§ 10119.....14
§ 10119.5.....14
§ 10119.7.....14
§ 10121(b).....16
§ 10121(c).....16
§ 10122.....12, 18
§ 10122.2.....12
§ 10123.....18
§ 10123.1.....12
§ 10123.2.....12
§ 10123.3.....13
§ 10123.4.....12
§ 10123.12.....14
§ 10123.13.....19
§ 10123.16.....13
§ 10123.17.....13
§ 10124.....16
§ 10125.....18
§ 10127.....17
§ 10127.1.....18
§ 10128.....17
§ 10128.2.....17
§ 10133.....14
§ 10140.....12
§ 10141.....12
§ 10143.....13
§ 10145.....13
§ 10177.7.....17
§ 10277.....16
§ 10278.....16
§ 11507-11511.....12
§ 11512.1.....16, 17
§ 11512.5.....17
§ 11512.13.....16
§ 11512.20.....17
§ 11512.23.....17
§ 11512.95.....13

Page

§ 11512.176.....14
§ 11512.177.....13
§ 11512.180.....19
§ 11512.195.....16

California Administrative Code
10 Cal.Admin. Code § 1300.6.....12
10 Cal.Admin. Code § 1300.67.2.....13
10 Cal.Admin. Code § 1300.68.....12
10 Cal.Admin. Code § 1300.70.....13

No. 88-1530

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Respondents,

AMICUS CURIAE BRIEF OF THE CALIFORNIA MEDICAL ASSOCIATION IN SUPPORT OF PETITIONER JOSEPH V. JULIANO

INTRODUCTORY STATEMENT

The undersigned Amicus Curiae, CALIFORNIA MEDICAL ASSOCIATION, respectfully submits this Brief in support of Real Party-in-Interest JOSEPH V. JULIANO. The undersigned is concerned with the present case because the undersigned believes that it is absolutely essential to the welfare of

the patients of its members that the laws of the State of California designed to enforce the California Insurance Code and protect such patients remain in full force and effect and not be emasculated and nullified by creating an exemption from these laws by preemption under the Employee Retirement Income Security Act, 29 U.S.C. sections 1001, et seq., (ERISA).

To decree the ERISA preemption sought by COMMERCIAL LIFE INS. CO. will result in serious increases in health care costs, a deterioration of service and serious financial hardship for those citizens and residents of this State who can least afford it--the sick and the disabled. (See Point IA, infra.)

Hereinbelow, we will show that this Court should not sanction such a result, for the following reasons:

1. It was not the intention of Congress to destroy the safeguards and protections afforded by state law for the benefit of the very persons Congress intended to protect by enacting ERISA (Point I, infra);

2. The United States Supreme Court decisions do not require an interpretation of ERISA preemption that would result in a wholesale nullification of all the laws of this State protecting beneficiaries of health care insurance (Point II, infra);

3. California Insurance Code section 790.03(h) is clearly a state law regulating insurance, and as such is exempt from ERISA. See Point III, infra.

I

IT WAS NOT THE INTENTION OF CONGRESS TO DESTROY THE SAFEGUARDS AND PROTECTIONS AFFORDED BY STATE LAW FOR THE BENEFIT OF THE VERY PERSONS CONGRESS INTENDED TO PROTECT BY ENACTING ERISA.

A. ERISA preemption would allow insurers to disregard and ignore important legislation enacted by this State for the welfare of the sick and disabled. Preemption will burden the health care system and cause the public to lose protection vital to necessary health care.

It is not a secret that the desire of the insurance industry to place itself under blanket federal regulation in the present situation is based on the fact that ERISA is not designed to insure prompt payment of legitimate insurance claims, and did not even contemplate this problem. See subsection B, infra. ERISA's civil enforcement provisions, 29 U.S.C. section 1132, provide only that a

civil action may be brought by a participant or beneficiary of an ERISA plan [1/] "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. section 1132(a)(1)(B).

ERISA preemption of state insurance laws permits insurers to delay or deny claims with impunity, the only penalty: pay what the insurance policy required them to pay in the first place and attorneys' fees in the discretion of the

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1 We use the term "ERISA plan" to refer to a plan subject to the provisions of ERISA. Such a plan is defined as an "employee benefits plan" established or maintained by an employer or employee organization engaged in any industry or activity affecting commerce. 29 U.S.C. section 1003(a). Certain plans, such as governmental or church plans, are exempt. 29 U.S.C. section 1003(b). "Employee benefit plan" is defined in 29 U.S.C. section 1002, subdivisions 1 through 3.

court. 29 U.S.C. section 1132(g). In states which regulate insurance by remedies in addition to contract benefits, the effect of the removal of the powerful prod of exposure to state law will be to cause inordinate delay in payment of entirely legitimate medical expenses and, in many instances, outright arbitrary refusal to pay these charges at all. 2/

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2 The preemption issue is also before this Court in Kanne v. Connecticut General Life Ins. Co. Nos. 85-5641 and 85-5642. (9th Cir. 1987) The Kanne case is a typical example of the type of abuses that will become increasingly prevalent in this State if our citizens are restricted to ERISA remedies. Therein, the plaintiffs' infant son had serious medical problems, requiring extensive hospitalization. See opinion of the District Court in Kanne v. Connecticut General Life Ins. Co. 607 F.Supp. 899 (C.D. Cal. 1985). Hospital bills of more the $89,000.00 were incurred, beginning in October 1981 (607 F.Supp. at p. 904). The insurer paid small amounts sporadically, with the result that some $69,000.00 of these bills remained unpaid until October 1982, one year later (607 F.Supp. at p. 906).

Moreover, under ERISA regulations, an insurance company could delay any decision as to whether to pay a claim for up to 300 days. 29 C.F.R. section 2560.503-1(e)(1)(3); section 2560.503-1(h). Thus, an insurer is not even considered in violation of ERISA provisions if it makes a decision on the claim within 10 months after the charges have been incurred. And even if it in

(Footnote 2 continued.)

District Judge Rafeedie, sitting without a jury, found the plaintiffs had sustained $250,000.00 emotional distress damages, and also assessed the insurer with $500,000.00 punitive damages, for breach of the common law duty of good faith and fair dealing and for breach of the Insurance Unfair Practices Act, California Insurance Code section 790.03(h) (607 F.Supp. at p. 910). The Ninth Circuit held under the subsequent decision in Pilot Life Ins. Co. v. Dedeaux 481 U.S. 41, 107 S.Ct. 1549 (1987). The California Insurance Unfair Practices Act was preempted even though the Court assumed the law regulates insurance and ERISA specifically exempts laws which regulate insurance.

fact violates this 10-month provision, it is not subject to any penalties, even the ineffective ERISA penalties. Insofar as we are aware, there is no provision in the statute or the regulations for prompt payment of a claim even if it is not denied or contested. See 29 U.S.C. section 1132; 29 C.F.R. section 2560.503-1.

We do not believe that our health care system can withstand a great number of delays in payment for such inordinate lengths of time, even if payment is ultimately made. Because of the large number of employees in California dependent on ERISA employee benefit plans to pay their bills, the potentially catastrophic effect of ERISA preemption is self-evident, and cannot seriously be denied. If an insurer may legally wait indefinitely to pay benefits, why should

it pay them promptly? The inevitable delays and outright denial of claims for fabricated and pretextual reasons will immeasurably add to the costs and burdens of health care providers, and these added costs and burdens will inevitably be passed on to the public.

Nor is the Insurance Unfair Practices Act the only state law protecting the patient which is threatened with extinction or emasculation by a broad interpretation of ERISA preemption. Numerous other beneficial and protective laws of this State are also threatened by such an interpretation. Some of these laws include the following:

1. Provisions aimed at insuring that non-profit hospital service plans and health care service plans contain adequate financing and reserves.

California Insurance Code sections 11507-11511, Health and Safety Code section 1375.1;

2. Provisions prohibiting insurers from discriminating between individuals because of race, color, religion, national origin or ancestry. California Insurance Code sections 10140, 10141;

3. Provisions prohibiting less favorable terms to employees in group disability insurance plans than to their spouses. California Insurance Code section 10122.2. See also California Insurance Code section 10123.4; Health and Safety Code section 1374;

4. Provisions prohibiting discrimination against physically handicapped persons. California Insurance Code sections 10123.1, 10123.2; Health and Safety Code section 1373(f);

5. Provisions prohibiting

discrimination against persons carrying a gene which causes no adverse effects in the carrier. California Insurance Code sections 10123.3, 10143, 11512.95; Health and Safety Code section 1374.7;

6. Provisions barring exclusion of victims of Alzheimer disease or other dementing illnesses from receiving benefits or other coverage. California Insurance Code sections 10123.16, 10123.17, 11512.177; Health and Safety Code section 1373.14;

7. Provisions barring group disability insurers and health care service plans from discriminating against the blind. California Insurance Code section 10145; Health and Safety Code section 1367.4;

8. Provisions preventing insurers from controlling the patient's selection of a hospital or physician. California

Insurance Code section 10133;

9. Provisions that health care service plans and hospital service plans which affect a patient's freedom of choice in selecting physicians or hospitals must clearly so inform the patient. California Insurance Code sections 10123.12, 11512.176; Health and Safety Code section 1367.10;

10. Provisions requiring health care service plans (which restrict the patient's freedom of choice of providers) to follow a variety or procedures to insure access to quality medical care, such as grievance systems (Health and Safety Code 1368; 10 Cal.Admin. Code section 1300.68); requirements that subscribers participate in formation of plan procedures (Health and Safety Code section 1369, 10 Cal.Admin. Code section 1300.6) and establishment of a quality of

care review system (Health and Safety Code section 1370, 10 Cal.Admin. Code section 1300.70);

11. Provisions requiring that facilities providing the primary health care services of a health care service plan must be located within reasonable proximity of the business or personal residences of enrollees, that the hours of operation and provisions for after-hour services must be reasonable and that emergency health care services must be available and accessible within the service area 24 hours a day, seven days a week. 10 Cal.Admin. Code section 1300.67.2;

12. Numerous provisions mandating that entities providing coverage for health care provide certain benefits, as well as coverage for dependents of the insured or plan participant. Some

examples of mandates include the following:

a. Requirements that coverage continue for certain dependents upon the attainment of the limiting age for dependency. California Insurance Code sections 10277, 10278, 10124; Health and Safety Code section 1374;

b. Requirements of coverage for newborn infants or newly adopted children. California Insurance Code sections 10119, 10121(b), 11512.1; Health and Safety Code section 1373;

c. Coverage requirements for maternity benefits. California Insurance Code section 10119.5, 10121(c), 11512.13; Health and Safety Code section 1373.4;

d. Coverage for conditions attributable to diethylstibestrol or exposure to it. California Insurance Code sections 10119.7, 11512.195; Health

and Safety Code section 1367.9;

e. Coverage requirements for diabetic daycare self-management education programs. California Insurance Code sections 10177.7, 11512.23; Health and Safety Code section 1367.5;

f. Coverage requirements for home health care. California Insurance Code section 11512.20; Health and Safety Code section 1374.10;

g. Coverage requirements for mental or nervous disorders. California Insurance Code sections 10125, 10127, 11512.5; Health and Safety Code section 1373(h);

13. Provisions requiring that coverage must be extended 12 months after discontinuance of a plan or policy for expenses relating to any condition causing total disability. California Insurance Code sections 10128, 10128.2;

Health and Safety Code section 1399.62;

14. Provisions to insure that providers of health coverage provide for an extension of coverage for any period following the termination of the employment of an employee, including dependents of the employee, upon the same terms and conditions precedent as apply to covered employees, for the same period of time. California Insurance Code sections 10122, 10123, 11512.1; Health and Safety Code section 1373;

15. A provision prohibiting a policy of insurance or health plan providing for loss of time benefits to contain any provision for a reduction of those benefits during a benefit period because of an increase in benefits payable under the Federal Social Security Act. California Insurance Code section 10127.1; Health and Safety Code section

1373;

16. Perhaps most importantly, the law of this State requires reimbursement of covered expenses no later than 30 days after receipt of the claim, unless a claim or portion thereof is contested. California Insurance Code sections 10123.13, 11512.180; Health and Safety Code section 1371. .

The foregoing constitute only some of the laws of this State aimed at protecting those of our citizens who may have medical problems requiring the services of physicians and hospitals. We believe that all of them, including the Unfair Practices Act, should be protected from ERISA preemption under the United States Supreme Court decision in Metropolitan Life Ins. Co. v. Massachusetts 471 U.S. 724, 105 S.Ct. 2380 (1985).

We do not know whether the insurance industry will concede that at least some of these provisions are not preempted. Clearly, state law mandated benefits provisions are within the ERISA savings clause and hence are not preempted. Metropolitan Life Ins. Co. v. Massachusetts, supra. These provisions alone establish that ERISA's asserted purpose of providing uniformity does not apply inflexibly. Any attempt to place other provisions within ERISA preemption will result in a situation in which those responsible for enforcing and administering the laws of this State will be unable to determine which laws are enforceable and which are nullified.

As we will now show, in enacting ERISA, Congress had no intention whatever of permitting insurance companies to nullify any of the foregoing

statutes. Of course, in determining preemption issues "(t)he purpose of Congress is the ultimate touchstone." Pilot Life Ins. Co. v. Dedeaux, supra, 107 S.Ct. at p. 1552.

B. Congress had no intention whatever of permitting the evils that would occur from ERISA preemption of state laws which afford urgently needed insurance protection to employees of ERISA welfare benefit plans.

In Metropolitan Life Ins. Co. v. Massachusetts, supra, the United States Supreme Court said:

> "We. . .must presume that Congress did not intend to preempt areas of traditional state regulation."

105 S.Ct. at p. 2389, 471 U.S. at p. 740

> "The presumption is against preemption,. . ."

105 S.Ct. at p. 2390, 471 U.S. at p. 741

It is clear that ERISA was

established for the primary purpose of safeguarding employee pensions plans, and was addressed to the problem that many pension plans relied on by employees for retirement income were rendered insecure and illusory by various questionable practices by the people administering the plans. Indeed, ERISA's title itself refers only to "retirement income security." 3/

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3 Thus, 29 U.S.C. section 1001 sets forth Congress' findings and declaration of policy. Subdivision (a) provides, in part:

> 1. "that despite the enormous growth in [employee benefit] plans many employees with long years of employment <u>are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans</u>";
>
> 2. "that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered";

The type of health care benefits involved at bar were an incidental, unconsidered form of compensation offered by some employees.

Nothing in the Congressional findings and declarations of policy even remotely reflect a Congressional intention to preempt state laws aimed at

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(Footnote 3 continued.)

> 3. "that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits"; and
>
> 4. "it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenues of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such [employee benefit] plans and their financial soundness." (Emphasis added.)

Subdivision (b) refers exclusively to reporting and disclosure requirements, which are obviously aimed at insuring the

protecting beneficiaries of medical, hospital or disability insurance contracts. To the contrary, these sections plainly and explicitly state that the "well-being and security of millions of employees and their dependents" is the primary purpose of ERISA. 29 U.S.C. section 1001, subdivision a. See also 29 U.S.C. section 1001a, subdivision (a)(3) and 29 U.S.C. section 1001b, subdivision (a((2).

It is therefore respectfully submitted that there is nothing to show

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(Footnote 3 continued.)
objective of adequate funding of ERISA employee benefit plans, and are peculiarly applicable to funding of retirement benefits. Their applicability to medical and hospitalization plans is marginal.

Subdivision (c) of 29 U.S.C. section 1001 refers only to private pension plans.

Congress also set forth further findings and declarations of policy 29 U.S.C. sections 1001a and 1001b. These sections refer solely to pension plans.

that Congress intended to nullify state laws which regulate insurance, particularly in view of Congress' explicitly stated intention to safeguard the "well-being and security of millions of employees and their dependents." 29 U.S.C. section 1001, subdivision (a).

II
THE UNITED STATES SUPREME COURT DECISIONS DO NOT REQUIRE AN INTERPRETATION OF ERISA PREEMPTION THAT WOULD RESULT IN A WHOLESALE NULLIFICATION OF ALL OF THE LAWS OF THIS STATE PROTECTING BENEFICIARIES OF HEALTH CARE INSURANCE.

As discussed above, the decision of the United States Supreme Court in Metropolitan Life Ins. Co. v. Massachusetts, supra, clearly supports the conclusion that ERISA preemption does not apply to any of the above-enumerated state laws enacted to protect beneficiaries of health care insurance,

including the Insurance Unfair Practices Act. That case states that there is a presumption against preemption of areas of "traditional state regulation" (471 U.S. at p. 740, 105 S.Ct. at p. 2389). The opinion further states that "we are not inclined to read limitations into federal statutes in order to enlarge their preemptive scope" (471 U.S. at p. 741, 105 S.Ct. at p. 2390). The Court rejected the contention that "Congress intended [a] narrow reading of the saving clause," 29 U.S.C. section 1144(b)(2)(A) (exempting from ERISA any state law which regulates insurance) (471 U.S. at pp. 745-746, 105 S.Ct. at p. 2392). See also 471 U.S. at pp. 746-747, 105 S.Ct. at p. 2393). It states that the saving clause if "broad on its face" (471 U.S. at p. 746, FN 24, 105 S.Ct. at p. 2393, FN 24).

Thus, the logical extension of

Metropolitan Life Ins. Co. v. Massachusetts would make it clear that it applies to the present case, where there is a specific state statute which on its face states that its purpose is to regulate insurance. Point III, infra. Indeed, the Fifth Circuit Court of Appeals in Pilot Life Ins. Co. v. Dedeaux, supra, relied on Metropolitan Life in concluding that even the common law cause of action for bad faith came within the saving clause (see Pilot Life, supra, 107 S.Ct. at p. 1551).

The Supreme Court in Pilot Life rejected that conclusion, based on the determination that the common law cause of action for bad faith did not regulate insurance because it was a state law of general application which is not specifically directed toward the insurance industry. 107 S.Ct. at pp.

1554-1555. However, Pilot Life did not address the situation where, as here, the applicable state law is specifically directed toward the insurance industry. See Point III, infra. The case before this Court is thus different from Pilot Life, just as the case before the Court in Pilot Life differs from that in Metropolitan Life. Pilot Life was not addressed to a situation such as the present situation. [4/]

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[4] The last portion of the Pilot Life decision (107 S.Ct. at pp. 1555-1558), with respect to the exclusivity of ERISA remedies, obviously only applies to actions to which the saving clause does not apply. Otherwise, it would almost entirely nullify the saving clause, and make superfluous the Court's previous detailed discussion as to whether the state law in question regulated insurance.

Thus, Pilot Life concluded with the statement that the state law suit is not saved by the saving clause and "therefore is preempted." (107 S.Ct. at p. 1558). Conversely, suits within the savings clause are not preempted and ERISA is

III
INSURANCE CODE SECTION 790.03(h) IS CLEARLY A STATE LAW REGULATING INSURANCE, AND AS SUCH IS EXEMPT FROM ERISA.

We respectfully submit that plain common sense demonstrates that Insurance Code section 790.03(h) is a state law regulating insurance and hence is exempted from ERISA by virtue of the saving clause, 29 U.S.C. section 1144(b)(2)(A). Insurance Code section 790.03(h) is a part of Article 6.5 of the Insurance Code, Insurance Code sections 790, et seq. It is clear that Article 6.5 was aimed and intended to come precisely within the provisions of the McCarran-Ferguson Act, 15 U.S.C. sections 1011, et seq. (providing that the business of insurance shall be subject to state laws which relate to the regulation

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(Footnote 4 continued.)
irrelevant to these suits.

of such business. See 15 U.S.C. sections 1011-1014).

Thus, Insurance Code section 790 specifically states that its purpose is "to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of March 9, 1945". The Act of Congress of March 9, 1945 is, of course, the McCarran-Ferguson Act.

Thus, there is no question but that our Legislature intended that Article 6.5 of the Insurance Code come within the McCarran-Ferguson saving provisions.

The saving clause in ERISA is interpreted in much the same manner as the saving clause in the McCarran-Ferguson Act. See Pilot Life, supra, 107 S.Ct. at pp. 1553-1554; Metropolitan Life Ins. Co. v. Massachusetts, supra, 471 U.S. 724,

743-744, 105 S.Ct. 2380, 2391. We therefore respectfully submit that it is clear that the provisions of Article 6.5 of the California Insurance Code are within the ERISA saving clause. See also: Federal Trade Commission v. National Cas. Co. 357 U.S. 560, 78 S.Ct. 1260 (1958) (state laws proscribing unfair insurance advertising [as does Article 6.5 of the Insurance Code--see Insurance Code sections 790.03(a) and (b)] constitute state regulation of the business of insurance as that phrase is used in the McCarran-Ferguson Act); Addrisi v. Equitable Life Assur. Society of U.S. (9th Cir. 1974) 503 F.2d 725, 728, cert. den. (1975) 420 U.S. 929, 95 S.Ct. 1129, rehearing den. (1975) 421 U.S. 922, 95 S.Ct. 1590, disapproved on other grounds, St. Paul Fire & Marine Ins. Co. v. Barry 438 U.S. 531, 98

S.Ct. 2923 (1978) (holding that Article 6.5 of the Insurance Code is a state law regulating the business of insurance).

The language of other provisions of Article 6.5 confirms that conclusion. In addition to the explicit language of California Insurance Code section 790, quoted above, Insurance Code sections 790.01 and 790.02 also recite that Article 6.5 applies to persons and practices "in the business of insurance".

Conversely, and unlike the situation in Pilot Life, the provisions of Article 6.5 do not apply to anyone who is not engaged in the business of insurance, and such persons or entities are not covered by the Act. See: Dill v. Claims Administration Services, Inc. 178 Cal.App.3d 1184 (1986); Richardson v. GAB Business Services, Inc. 161 Cal.App.3d 519 (1984); Wolfrich v. United Services

Automobile Ass'n. 149 Cal.App.3d 1206 (1983). Indeed, in Isaacson v. California Insurance Guarantee Association, supra, this Court reaffirmed that an entity must be in the business of insurance to be subject to California Insurance Code section 790.03(h), and limits such entities to those who issue policies, collect premiums, make profits and assume contractual obligations to insureds (44 Cal. 3d at p. 787).

We therefore respectfully submit that any "common-sense view" of the matter (see Pilot Life, supra, 107 S.Ct. at p. 1553) demonstrates that California Insurance Code section 790.03(h) is a law regulating insurance which is specifically exempted from ERISA.

Conclusion

The public policy of California requires that the detailed legislation enacted by our Legislature to protect those unfortunate citizens of this State who must receive extensive health care services should not be nullified by departing from the common-sense view of the language of the applicable statutes. Such an interpretation would have a seriously adverse effect on health care in this State.

Respectfully submitted,

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IN THE

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. ii

SUPPLEMENTAL ARGUMENT 1

I. THE CALIFORNIA STATE LEGISLATURE HAS BEFORE IT LEGISLATION WHICH, UNDER THE CALIFORNIA SUPREME COURT HOLDING IN THIS CASE, WOULD BE SUBJECT TO ERISA PREEMPTION EVEN THOUGH THE LEGISLATION REGULATES INSURANCE. 2

II. THE SUPREME COURTS OF NEVADA, LOUISIANA AND CALIFORNIA ARE IN CONFLICT, AND STATE SUPREME COURTS ARE IN NEED OF GUIDANCE FROM THIS COURT TO UNIFORMLY APPLY THE LAW THIS COURT SET FORTH IN *PILOT LIFE v. DEDEAUX*. 3

III. RESPONDENTS' ARGUMENT THAT THIS CASE IS NOT RIPE IS FALSE AND IMPROPERLY ASKS THIS COURT TO CONSIDER EVIDENCE WHICH IS NOT IN THE RECORD. 9

IV. CONCLUSION 9

APPENDIX A

Senate Bill No. 1329 . . . . . .A-1

TABLE OF AUTHORITIES

Page

Cases

California, et al. v. ARC America Corp., et al.
No. 87-1862, decided April 18, 1989 5

Kanne v. Connecticut General Life
Insurance Company
867 F.2d 489 (9th Cir. 1989) 4

Massachusetts v. Morash
No. 88-32, decided April 18, 1989 . . . . . .6, 7

Moradi-Shalal v. Fireman's Fund
Insurance Company
758 P.2d 58 (Cal. 1988) 2, 3

Pilot Life Ins. Co. v. Dedeaux
107 S.Ct. 1549 (1987) 3-5

Royal Globe Insurance Company v.
Superior Court
23 Cal.3d 880 (1979) 2, 3

Soniat v. Travelers
La. No. 87-C-2705,
1989 La. Lexis 98 (La. 1989) 4

Turnbow v. Pacific Mutual Life Ins. Co.
765 P.2d 1160 (Nev. 1988) 4

Page

State Statutes

California Insurance Code
section 790.03(h) 3
section 790.031 2

Acts

Employee Retirement and Income
Security Act (ERISA)
29 U.S.C. section 1001 2

McCarran-Ferguson Act
15 U.S.C. section 1012 3

Bills

Senate Bill No. 1329 2

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REPLY BRIEF OF PETITIONER

Petitioner, JOSEPH JULIANO, respectfully submits this reply brief pursuant to Supreme Court Rule 22.5.

SUPPLEMENTAL ARGUMENT

Since Petitioner, JOSEPH JULIANO, submitted his Petition for Writ of Certiorari, he has become aware of pending California legislation and recent Supreme Court opinions in other states contrary to the position taken by the California Supreme Court on the federal question of ERISA preemption. In addition, Petitioner files this reply in response to false and misleading argument presented by Respondents and in objection to

Respondents' attempt to introduce irrelevant hearsay evidence at the appellate level which is not in the record on appeal.

I.

THE CALIFORNIA STATE LEGISLATURE HAS BEFORE IT LEGISLATION WHICH, UNDER THE CALIFORNIA SUPREME COURT HOLDING IN THIS CASE, WOULD BE SUBJECT TO ERISA PREEMPTION EVEN THOUGH THE LEGISLATION REGULATES INSURANCE.

On March 9, 1989, Senators Marks and Rosenthal introduced legislation adding section 790.031 to the California Insurance Code. A copy of Senate Bill No. 1329 is attached as Appendix "A" to this reply brief. This legislation declares that the purpose of the Article is to regulate unfair insurance practices by creating a private cause of action to enforce the California Insurance Code. Remedies under this statute are not a claim for benefits under an employee benefit plan and are in addition to remedies provided under the Employee Retirement and Income Security Act (ERISA), 29 U.S.C. section 1001 *et seq.* This proposed law clearly regulates insurance by imposing a financial disincentive on insurance companies operating in California contrary to California law regulating insurance.

The proposed statute would specifically abrogate the recent California Supreme Court decision in *Moradi-Shalal v. Fireman's Fund Insurance Company*, 758 P.2d 58 (Cal. 1988), by recreating a private cause of action for violation of the state's insurance code as has been the law in California since 1979 when the California

Supreme Court decided *Royal Globe Insurance Company v. Superior Court*, 23 Cal.3d 880 (1979). If, however, as assumed by the California Supreme Court in the present case, even state laws regulating insurance are preempted by ERISA the Supreme Court has prospectively tied the hands of the legislature even before it attempts to perform its responsibility under the McCarran-Ferguson Act, 15 U.S.C. section 1012 *et seq.*, and as specifically saved from preemption by ERISA.

Thus, Respondents' brief in opposition asserting that this case will have minimum impact and is moot in light of *Moradi-Shalal* is false. The question presented in this petition is of ongoing and critical importance to the California Legislature, the Department of Insurance, and the citizens of California protected by California Insurance Code section 790.03(h).

II.

THE SUPREME COURTS OF NEVADA, LOUISIANA AND CALIFORNIA ARE IN CONFLICT, AND STATE SUPREME COURTS ARE IN NEED OF GUIDANCE FROM THIS COURT TO UNIFORMLY APPLY THE LAW THIS COURT SET FORTH IN *PILOT LIFE v. DEDEAUX*.

The California Supreme Court's decision in this case is not correct and is in direct conflict with the results reached by Supreme Courts in other jurisdictions.[1]

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[1] Respondent declares that the California Supreme Court's decision in this case is supported by all available precedent. To the contrary, in the murky waters of ERISA preemption swallowing up the time and resources of state and federal courts across the nation since the *Pilot Life* decision the results have been inconsistent and the rules

(continued)

On January 30, 1989, the Louisiana Supreme Court found that ERISA did not preempt a Louisiana statute even though plaintiff's complaint clearly stated a cause of action for recovery of benefits under both ERISA and Louisiana law. *Soniat v. Travelers*, La. No. 87-C-2705, 1989 La. Lexis 98 (La. 1989)

On December 21, 1988, the Nevada Supreme Court held that the owner of a liquor store who had purchased health insurance for herself and her employees had not created an employee benefit plan subject to ERISA preemption and, therefore, her state law claims were not preempted. *Turnbow v. Pacific Mutual Life Ins. Co.*, 765 P.2d 1160 (Nev. 1988)

As set forth in the analysis submitted by the California Attorney General in the amicus curiae brief filed supporting JULIANO's petition for writ of certiorari, it is clear that the Attorney General feels the *Juliano* decision precludes regulation of insurance by both the State Legislature and the Department of Insurance. This result is completely contrary to the statutory scheme set up by ERISA. The Department of

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(ftn. continued)
applied willynilly in an astounding array of result-orientated decisions. In fact, the principal case cited by the Respondent, *Kanne v. Connecticut General Life Insurance Company*, 867 F.2d 489 (9th Cir. 1989), is currently pending on writ of certiorari before this Court. Counsel of record for Connecticut General Life Insurance Company opposing Kanne's Petition for Writ of Certiorari is counsel of record *filing* the Petition for Writ of Certiorari by Pacific Mutual Life Insurance Company in *Turnbow* from the Supreme Court of Nevada also pending before this Court, this term. The reason for this apparent hypocrisy is obvious: In California the insurance company won, in Nevada the insurance company lost. The seriousness of the question presented as to the scope of the preemption announced in *Pilot Life* is no different in Nevada than in California.

Labor is completely incapable by expertise, resources, and by law, of regulating insurance in the different states.[2]

Two recent opinions by this Honorable Supreme Court reflect the urgency with which this Court should revisit some of the unanswered questions left by *Pilot Life Ins. Co. v. Dedeaux*, 107 S.Ct. 1549 (1987). *California, et al. v. ARC America Corp., et al.*, No. 87-1862, decided April 18, 1989 on appeal from the United States Court of Appeals for the Ninth Circuit held federal preemption of antitrust recoveries did not require preemption of a state law which created a remedy for violation of state antitrust laws. This Court found that the state laws were not inconsistent with and did not act as an obstacle to the Congressional purposes served by federal antitrust preemption. The same analysis should apply to a state law which permits a private cause of action to enforce state regulation of insurance as the regulation applies to insurance companies who sell policies to employers operating within the state. Just as in *California v. ARC, supra*, where state court remedies for antitrust violation did not violate the

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[2] The McCarran-Ferguson Act and the Employee Retirement and Income Security Act both assume regulation of insurance is left at the state level. A review of the rules and regulations set out by the Department of Labor as well as a review of the opinions of the Department of Labor reveal that the Department of Labor has not and is not prepared to handle the highly complex and technical regulation of insurance. Making the Department of Labor in charge of the regulation of insurance by binding a state's civil enforcement of its insurance code to ERISA preemption would be the same as putting the Department of Labor in charge of the regulation of banking and securities where an employee benefit fund maintains a bank account or obtains investments for the fund. The Department of Labor should regulate labor, not insurance, not banking, and not securities.

purposes of federal antitrust law, state court remedies enforcing state insurance law do not interfere with the federal purpose underlying ERISA. These state laws cannot and do not purport to affect any of the principal concerns addressed by ERISA. As set forth in numerous decisions of this Court and referenced in JULIANO's Petition for Writ of Certiorari, the principal purpose for the establishment of uniform national regulation of employee benefit plans was to prevent widespread abuse by pension plan trustees and to safeguard funds set aside to provide retirement income. Claims under the state insurance statutes do not affect the cost or administration of employee benefit plans because the risk of violating the state statute is not upon the employer or the plan, the risk is on the insurance company who sells a product at a fixed price to all group purchasers in the state.

Also on April 18, 1989, this Court issued its decision in *Massachusetts v. Morash*, No. 88-32:

> In enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds. [Citation.] Tc that end, it has established extensive reporting, disclosure, and fiduciary duty requirements to insure against the possibility that the employee's expectation of the benefit would be defeated through poor management by the plan administrator. Because ordinary vacation payments are typically fixed, due at known times, and do not depend on contingencies outside the employee's control, they present none of the risks that ERISA is intended to address. If there is a danger of defeated expectations, it is no different from the danger of defeated expectations of

> wages for services performed — a danger Congress chose not to regulate in ERISA.

Similarly, as between the employer and the insurance company providing group policy benefits, a state law remedy which regulates insurance by creating a financial disincentive for violation of a state's insurance laws does not affect the management of funds accumulated to finance employee benefits nor does it affect the failure to pay employee benefits from accumulated funds. In the insurance context, the employer pays a fixed insurance premium, determined by the market place and an underwriter's assessment of the potential risk for medical expenses: contingencies outside both the employee's and the employer's control. In the insurance context, an insurance company offers coverage in exchange for premium. The business of the insurance company then depends upon the successful investment of this premium and the accuracy with which the actuary has predicted, and reserved for, claims. Thus, benefit payments are not made by plan funds and an insurance company's liability outside the terms of the contract do not affect the integrity of the plan funds. Congress specifically chose not to get involved in the regulation of this cost-risk assessment and left it up to the individual states in both the McCarran-Ferguson Act and in ERISA.

Of additional concern in *Morash*, was the extension of ERISA preemption to claims which would vastly expand the jurisdiction of the federal courts and provide a federal forum for any employee with a grievance based on a state law concerning vacation benefits because most employers in the United States provide some type of vacation benefit. Similarly, most employers purchase group insurance policies for their employees. A survey performed in 1988 shows that 84% of employers insure employees' health care either by direct underwriting with an insurance company or by self-funding with a

stop-loss insured by an insurance company.[3] (See 1988 Foster, Higgins Health Care Benefits Survey 23.)

Until *Juliano*, California courts routinely settled disputes between an employee and an insurance company involving payment of medical bills. Since the employee had a direct claim against the insurance company for violation of the state insurance code, the employer often was not even a party to the suit. Indeed, it is easy to see an employee's reluctance to sue his employer when the wrongdoer is not the employer or the plan fiduciary, but is an independent financially-motivated insurance company. ERISA was designed to give workers access to the courthouse, not a shove out the door of employment. Frequently, these disputes do not involve large sums of money, if the state court verdict exceeds the amount of benefits due for the medical claim it is because a court has found that the insurance company has violated the state's law regulating insurance.

State court remedies against an insurance company for violation of the Insurance Code cannot be assessed against an employee benefit plan. (See Juliano's Petition for Writ of Certiorari, pages 17-21.) Therefore, if the insurance company is sanctioned by a state court for violation of state insurance law, neither the integrity of the plan, nor the assets of the fund, are affected. ERISA preemption of a claim for benefits under an ERISA plan applies to a claim for medical benefits where the plan is self-funded. Such a result is consistent with Congress' intention to protect funds available to pay employee

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[3] The importance of this issue to health care in California can be seen in the Motion to File and Amicus Curiae brief filed by the California Medical Association in support of Juliano's Petition for Writ of Certiorari.

benefits and Congressional intent to save regulation of insurance from federal preemption.

III.

RESPONDENTS' ARGUMENT THAT THIS CASE IS NOT RIPE IS FALSE AND IMPROPERLY ASKS THIS COURT TO CONSIDER EVIDENCE WHICH IS NOT IN THE RECORD.

In an extremely improper and highly prejudicial manner, Respondents attempt to introduce for the first time, unverified, hearsay, irrelevant evidence which does not appear in the record before this Court. Citing cases which have no application and which do not stand for the proposition that this Court can consider the appendixes attached, Respondents attempt to create a smoke screen hiding the very real issues presented in this petition. Petitioner respectfully requests this Court ignore this improper and prejudicial tactic.

IV.

CONCLUSION

For the reasons set forth in this brief, the Petition for Writ of Certiorari and the amicus curiae brief filed by the California Attorney General, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Dated April 28, 1989, Claremont, California.

Respectfully submitted,

SHERNOFF, SCOTT & BIDART

By: MARIAN HAYCOCK TULLY

Attorneys for Petitioner

SENATE BILL No. 1329

Introduced by Senators Marks and Rosenthal
(Coauthor: Assembly Member Connelly)

March 9, 1989

An act to add Section 790.031 to the Insurance Code, relating to insurance.

LEGISLATIVE COUNSEL'S DIGEST

SB 1329, as introduced, Marks. Insurance: good faith.

Existing law prohibits certain unfair and deceptive practices in the business of insurance. However, under existing law, a violation of those statutory provisions does not, in itself, give rise to a private cause of action against an insurer.

This bill would provide that any person engaged in the business of insurance is required to act in good faith toward, and to deal fairly with, policyholders and others, as specified. The bill would provide that a policyholder or other person may bring an action against an insurer or other licensee of the Department of Insurance for a violation of that requirement and other statutory provisions that prohibit unfair and deceptive practices, and may recover compensatory and exemplary damages.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 790.031 is added to the Insurance Code, to read:

790.031. Any person engaged in the business of insurance in the State of California is required to act in good faith toward, and to deal fairly with, current and prospective policyholders and other persons intended to be protected by any policy of insurance. A policyholder or a third party may bring an action against an insurer or licensee for violation of the provisions of this article, including, but not limited to, subdivision (h) of Section 790.03.

In accordance with the Unruh Civil Rights Act, Section 51 of the Civil Code, an insurer shall not arbitrarily discriminate against individuals in the denial of insurance coverage.

The purpose of this article is to regulate unfair insurance practices, including unfair claims practices, by providing state-court remedies, including compensatory and exemplary damages, to policyholders and claimants who are victims of unfair insurance practices. It is specifically intended that these remedies be construed to regulate the business of insurance regardless of whether the policy was purchased individually or as a member of a group, and regardless of whether or not the policy was purchased or provided by or through an employer, and thereby to provide that state-law remedies are available notwithstanding the provisions of the Employee Retirement and Income Security Act, 29 U.S.C. Section 1001 *et seq*.

Any award of punitive damages against an insurer shall not be passed on to policyholders directly or indirectly.